

Elder and Long Term Care Committee

**Wednesday, February 22, 2006
10:30 AM – 12:00 PM
Reed Hall (102 HOB)**

Meeting Packet

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Elder & Long-Term Care Committee

Start Date and Time: Wednesday, February 22, 2006 10:30 am

End Date and Time: Wednesday, February 22, 2006 12:00 pm

Location: Reed Hall (102 HOB)

Duration: 1.50 hrs

Consideration of the following bill(s):

HB 399 Criminal Offenses by Davis, D.
HB 425 CS Florida Trust Code by Mahon
HB 451 Affordable Housing for the Elderly by Machek
HB 577 Medicaid Comprehensive Geriatric Fall Prevention Program by Garcia

Consideration of the following proposed committee bill(s):

PCB ELT 06-01 -- Continuation of a moratorium on the approval of certificates of need for additional community nursing home beds
PCB ELT 06-02 -- Nursing home consumer information

Presentation by Office of Long-Term Care Ombudsman
Presentation by Office of Statewide Public Guardian

NOTICE FINALIZED on 02/10/2006 16:10 by MANNING.KAREN



House of Representatives
Elder and Long Term Care Committee

A G E N D A

February 22, 2006
10:30 AM – 12:00 PM
Reed Hall (102 HOB)

- I. Opening Remarks by the Chair**
- II. Consideration of the following bill(s):**
 - HB 399 Criminal Offenses by Davis, D.**
 - HB 425 CS Florida Trust Code by Mahon**
 - HB 451 Affordable Housing for the Elderly by Machek**
 - HB 577 Medicaid Comprehensive Geriatric Fall Prevention Program by Garcia**
- III. Consideration of the following proposed committee bill(s):**
 - PCB ELT 06-01 Continuation of a Moratorium on the Approval of Certificates of Need for Additional Community Nursing Home Beds**
 - PCB ELT 06-02 Nursing Home Consumer Information**
- IV. Presentation by Office of Long-Term Care Ombudsman**
- V. Presentation by Office of Statewide Public Guardian**
- VI. Closing Remarks by the Chair**
- VII. Adjournment**

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 399

Criminal Offenses

SPONSOR(S): Davis

TIED BILLS:

IDEN./SIM. BILLS: SB 140

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N	Kramer	Kramer
2) Elder & Long-Term Care Committee		Walsh	Walsh
3) Criminal Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

HB 399 provides for increased penalties for offenses committed against an elderly or disabled victim as follows:

- The bill provides for the reclassification of all felony offenses committed against an elderly person or disabled adult regardless of whether the offender was aware of the age or infirmity of the victim. Under this provision, a felony committed against an elderly or disabled victim will be reclassified as follows: a third degree felony will be reclassified to a second degree felony; a second degree felony will be reclassified to a first degree felony and a first degree felony will be reclassified to a first degree felony punishable by a life sentence. This will have the affect of increasing the maximum sentence which can be imposed for the offense.
- The bill also removes language that was adopted during the 2002 session which specifically applied to theft offenses committed against a victim age 65 or older. The bill replaces this language by providing that if the funds, assets, or property involved in a theft from a person 65 years of age or older is valued at \$10,000 or more, the court must impose a mandatory minimum sentence of three years imprisonment.
- The bill also amends the section of statute relating to exploitation of an elderly person or disabled adult to provide that if the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$10,000 or more, the court must sentence the offender to a mandatory minimum sentence of three years imprisonment.

The Criminal Justice Impact Conference met on January 9, 2006 to consider the prison bed impact of this bill on the Department of Corrections and determined that the bill could potentially have a significant impact on the prison bed population at the Department of Corrections. See Fiscal Comments section.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill increases the sanctions for offenses committed against elderly persons and disabled adults and will require the imposition of minimum mandatory sentences in certain circumstances.

Promote personal responsibility: The bill reclassifies the degree of felony offenses committed against elderly persons and disabled adults.

B. EFFECT OF PROPOSED CHANGES:

Reclassification of all felony offenses committed against elderly or disabled: Currently, section 775.085, F.S. provides that the penalty for any felony or misdemeanor must be reclassified¹ if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability or *advanced age* of the victim. The term advanced age is defined to mean that the victim is older than 65 years of age.

HB 399 creates section 775.0847 which provides for the reclassification of felony offenses committed upon:

1. a person 65 years of age or older;
2. a person 60 years of age or older² who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired; or
3. a disabled adult³ which is defined as a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living

HB 399 provides that a felony offense committed against a victim listed above will be reclassified *regardless of whether the offender knew or had reason to know the age, infirmity or disability of the victim* as follows:

- A third degree felony will be reclassified to a second degree felony.
- A second degree felony will be reclassified to a first degree felony.
- A first degree felony will be reclassified to a felony of the first degree, punishable by life imprisonment.

The reclassification of these offenses will have the effect of increasing the maximum sentence that a judge can impose for the offense. The maximum sentence for a third degree felony is five years imprisonment; for a second degree felony is fifteen years imprisonment and for a first degree felony is thirty years imprisonment.⁴

¹ Under the section, a second degree misdemeanor is reclassified as a first degree misdemeanor; a first degree misdemeanor is reclassified as a third degree felony; a third degree felony will be reclassified to a second degree felony; a second degree felony will be reclassified to a first degree felony and a first degree felony will be reclassified to a felony of the first degree, punishable by life imprisonment.

² This definition is contained in s. 825.101(5), F.S.

³ This definition is contained in s. 825.101(4), F.S.

⁴ s. 775.082, F.S.

Assault or Battery on Victim Age 65 or Older: Currently, section 784.08 provides that when a person is charged with committing assault⁵, aggravated assault⁶, battery⁷ or aggravated battery⁸ against a victim age 65 or older, the assault or battery offense is reclassified as follows:

- In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.
- In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.
- In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
- In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

The section also applies a three year minimum mandatory sentence⁹ against an offender who has been convicted of aggravated assault or aggravated battery against an elderly person.

HB 399 amends this section to remove the reclassification for aggravated assault and aggravated battery offenses committed against an elderly person, presumably because the newly created s. 775.0847, F.S. (discussed above) will cover those felony reclassifications.

Theft: The theft statute, section 812.014, F.S. provides the following:

A person commits theft if he or she knowingly obtains or uses or endeavors to obtain or to use, the property of another with intent to either temporarily or permanently:

1. Deprive the other person of a right to the property or a benefit from the property or
2. Appropriately the property to his or her own use or to the use of any person not entitled to the use of the property.

Theft of property valued between \$100 and \$300 is considered "petit theft" and is a first degree misdemeanor. Theft of property worth between \$300 and \$20,000 is a third degree felony.¹⁰ Theft of property worth more than \$20,000, but less than \$100,000, is a second degree felony. Theft of property worth more than \$100,000 is a first degree felony.

⁵ An assault is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. § 784.011, F.S.

⁶ An aggravated assault is an assault with a deadly weapon without intent to kill or with an intent to commit a felony. § 784.021, F.S.

⁷ A battery occurs when a person actually and intentionally touches or strikes another person against the will of the other or intentionally causes bodily harm to another person. § 784.03, F.S.

⁸ An aggravated battery occurs when a person in committing battery intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or uses a deadly weapon. Aggravated battery also occurs if the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant. § 784.045, F.S.

⁹ This provision is contained in s. 784.08(1), F.S.

¹⁰ Within the third degree felony theft category, the value of the stolen property is further divided and are assigned different rankings in the offense severity ranking chart of the Criminal Punishment Code. Theft of property valued at more than \$300 and less than \$5,000 is a Level 2 offense. Theft of property valued at \$5,000 but less than \$10,000 is a Level 3 offense. Theft of property worth more than \$10,000 but less than \$20,000 is a Level 4 offense. Thus, while the maximum penalty for a theft of any amount of property between \$300 and \$20,000 would have the same maximum sentence of five years in prison, the lowest permissible sentence would depend on the value of the property.

During the 2002 session, legislation passed¹¹ which specifically applied to theft offenses committed against a victim age 65 or older when the offender knows or has reason to believe that the victim is over the age of 65, as follows:

1. If the "funds, assets, or property involved in the theft" from a person over 65 are valued at \$50,000 or more, the offense is a first degree felony.
2. If the funds, assets or property involved in the theft from a person over 65 is valued at \$10,000 or more but less than \$50,000, the offense is a second degree felony.
3. If the funds, assets or property involved in the theft from a person over 65 is valued at \$300 or more but less than \$10,000, the offense is a third degree felony.

Section 812.0145 also ranked the newly created theft offenses in the offense severity ranking chart of the Criminal Punishment Code. Theft of between \$300 and \$10,000 was ranked in level 3, theft of between \$10,000 and \$50,000 was ranked in level 5 and theft of more than \$100,000 was ranked in level 7.¹²

HB 399 removes most of the language that was adopted during the 2002 session relating to theft from an elderly person. The bill replaces this language by providing that if the funds, assets, or property involved in a theft from a person 65 years of age or older is valued at \$10,000 or more, the court must impose a mandatory minimum sentence of three years imprisonment. The bill further provides that the minimum mandatory sentence does not apply to the theft of one or more motor vehicles, regardless of their value.

Exploitation of Elderly or Disabled Adult: Currently, section 825.103 provides penalties for the exploitation of an elderly person or disabled adult as follows:

(1) "Exploitation of an elderly person or disabled adult" means:

(a) Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:

1. Stands in a position of trust and confidence with the elderly person or disabled adult; or
2. Has a business relationship with the elderly person or disabled adult; or

(b) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent.

(2)(a) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$100,000 or more, the offender commits a felony of the first degree.

¹¹ Chapter 2002-162; Passed as HB 835 by Rep. Gardiner.

¹² s. 921.0022, F.S. The lowest permissible sentence for an offense ranked in level 3 or level five of the offense severity ranking chart is any non-state prison sanction. The lowest permissible sentence for an offense ranked in level 7 of the offense severity ranking chart is 21 months in state prison. The maximum sentence for a third degree felony is five years in prison, for a second degree felony is fifteen years in prison and for a first degree felony is thirty years in prison. s. 775.082, F.S.

(b) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$20,000 or more, but less than \$100,000, the offender commits a felony of the second degree.

(c) If the funds, assets, or property involved in the exploitation of an elderly person or disabled adult is valued at less than \$20,000, the offender commits a felony of the third degree.

The bill amends this section to provide that if the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$10,000 or more, the court must sentence the offender to a mandatory minimum sentence of three years imprisonment.

The bill also makes corresponding changes to section 775.0877, F.S. relating to mandatory orders for HIV testing in cases involving certain assault and battery offenses and to section 921.0022, F.S., relating to the offense severity ranking chart of the Criminal Punishment Code.

C. SECTION DIRECTORY:

Section 1. Provides that the act may be cited as "The Seniors' Safety Act".

Section 2. Creates s. 775.0847, F.S.; providing for reclassification of felony offenses committed against elderly or disabled person.

Section 3. Amends s. 784.08, F.S.; relating to assault or battery on persons 65 years of age or older.

Section 4. Amends s. 812.0145, F.S.; relating to theft from persons 65 years of age or older.

Section 5. Amends s. 825.103, F.S.; relating to exploitation of an elderly person or disabled adult.

Section 6. Amends s. 775.0877; relating to criminal transmission of HIV; changing cross-reference.

Section 7. Amends s. 921.0022, F.S.; making corresponding changes to offense severity ranking chart of Criminal Punishment Code.

Section 8. Provides effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference met on January 9, 2006 to consider the prison bed impact of this bill on the Department of Corrections. The conference determined that the bill could potentially have a significant impact on the prison bed population at the Department of Corrections. The bill provides for the reclassification of all felony offenses committed against an elderly or disabled victim, regardless of whether the offender knew the age, infirmity or disability of the victim. It is not possible to determine how many felonies are committed against a victim age 65 or older in Florida each year. However, approximately 17.5 percent of the state population of 16.9 million is age 65 or older. The bill also requires the imposition of a mandatory minimum three year prison

sentence for the offense of theft against an elderly person and the offense of exploitation of an elderly person or disabled adult.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

HB 399

2006

A bill to be entitled

An act relating to criminal offenses; providing a short title; creating s. 775.0847, F.S.; providing for the reclassification of felonies committed against the elderly or disabled; amending s. 784.08, F.S.; providing for the reclassification of misdemeanors committed against persons 65 years of age or older; amending s. 812.0145, F.S.; providing for a mandatory term of imprisonment for certain thefts against persons 65 years of age or older; amending s. 825.103, F.S.; providing for a mandatory term of imprisonment for certain acts of exploitation against an elderly person or disabled adult; amending ss. 775.0877 and 921.0022, F.S., relating to orders for HIV testing for certain offenses and the sentencing guidelines; revising an offense description and conforming cross-references to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This act may be cited as "The Seniors' Safety Act."

Section 2. Section 775.0847, Florida Statutes, is created to read:

775.0847 Felonies committed against the elderly or disabled; reclassification of offenses.--Whenever a person is charged with committing a felony offense upon a person 65 years of age or older or an elderly person or disabled adult as defined in chapter 825, regardless of whether the person charged

HB 399

2006

knew or had reason to know the age, infirmity, or disability of the victim, the offense for which the person is charged shall be reclassified as follows:

(1) In the case of a felony of the third degree, the offense is reclassified to a felony of the second degree.

(2) In the case of a felony of the second degree, the offense is reclassified to a felony of the first degree.

(3) In the case of a felony of the first degree, the offense is reclassified to a felony of the first degree, punishable by life imprisonment.

Section 3. Subsection (2) of section 784.08, Florida Statutes, is amended to read:

784.08 Assault or battery on persons 65 years of age or older; reclassification of offenses; minimum sentence.--

(2) Whenever a person is charged with committing an assault ~~or aggravated assault~~ or a battery ~~or aggravated battery~~ upon a person 65 years of age or older, regardless of whether the person charged knew he or she knows or had ~~has~~ reason to know the age of the victim, the offense for which the person is charged shall be reclassified as follows:

~~(a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.~~

~~(b) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.~~

(a)(e) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

(b)(d) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

HB 399

2006

Section 4. Section 812.0145, Florida Statutes, is amended to read:

812.0145 Theft from persons 65 years of age or older; penalties ~~reclassification of offenses~~---

(1) A person who is convicted of theft of more than \$1,000 from a person 65 years of age or older shall be ordered by the sentencing judge to make restitution to the victim of such offense and to perform up to 500 hours of community service work. Restitution and community service work shall be in addition to any fine or sentence which may be imposed and shall not be in lieu thereof.

(2) Notwithstanding any other law, if the funds, assets, or property involved in a theft from a person 65 years of age or older is valued at \$10,000 or more, the court shall sentence the offender to a mandatory minimum term of imprisonment of 3 years. ~~However, the mandatory term of imprisonment does not apply to the theft of one or more motor vehicles, regardless of associated value. Whenever a person is charged with committing theft from a person 65 years of age or older, when he or she knows or has reason to believe that the victim was 65 years of age or older, the offense for which the person is charged shall be reclassified as follows:~~

(a) This subsection does not prevent a court from imposing a greater sentence of incarceration as authorized by law. ~~If the funds, assets, or property involved in the theft from a person 65 years of age or older is valued at \$50,000 or more, the offender commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.~~

(b) If the minimum mandatory term of imprisonment imposed under this section exceeds the maximum sentence authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, the mandatory minimum sentence must be imposed. If the mandatory minimum term of imprisonment under this section is less than the sentence authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, the sentence imposed by the court must include the mandatory minimum term of imprisonment required in this subsection. ~~If the funds, assets, or property involved in the theft from a person 65 years of age or older is valued at \$10,000 or more, but less than \$50,000, the offender commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.~~

~~(c) If the funds, assets, or property involved in the theft from a person 65 years of age or older is valued at \$300 or more, but less than \$10,000, the offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.~~

Section 5. Subsections (3) and (4) are added to section 825.103, Florida Statutes, to read:

825.103 Exploitation of an elderly person or disabled adult; penalties.--

(3) Notwithstanding any other law, if the funds, assets, or property involved in the exploitation of an elderly person or a disabled adult is valued at \$10,000 or more, the court shall sentence the offender to a mandatory minimum term of imprisonment of 3 years.

(4) If the minimum mandatory term of imprisonment imposed

HB 399

2006

under subsection (3) exceeds the maximum sentence authorized by
s. 775.082, s. 775.084, or the Criminal Punishment Code under
chapter 921, the mandatory minimum sentence must be imposed. If
the mandatory minimum term of imprisonment under this section is
less than the sentence authorized by s. 775.082, s. 775.084, or
the Criminal Punishment Code under chapter 921, the sentence
imposed by the court must include the mandatory minimum term of
imprisonment required in subsection (3). This subsection does
not prevent a court from imposing a greater sentence of
incarceration as authorized by law.

Section 6. Subsection (1) of section 775.0877, Florida
Statutes, is amended to read:

775.0877 Criminal transmission of HIV; procedures;
penalties.--

(1) In any case in which a person has been convicted of or
has pled nolo contendere or guilty to, regardless of whether
adjudication is withheld, any of the following offenses, or the
attempt thereof, which offense or attempted offense involves the
transmission of body fluids from one person to another:

- (a) Section 794.011, relating to sexual battery,
- (b) Section 826.04, relating to incest,
- (c) Section 800.04(1), (2), and (3), relating to lewd,
lascivious, or indecent assault or act upon any person less than
16 years of age,
- (d) Sections 784.011, 784.07(2)(a), and 784.08(2)(b)
~~784.08(2)(d)~~, relating to assault,
- (e) Sections 784.021 and, ~~784.07(2)(c), and 784.08(2)(b)~~,
relating to aggravated assault,

HB 399

2006

141 (f) Sections 784.03, 784.07(2)(b), and 784.08(2)(a)
 142 ~~784.08(2)(e)~~, relating to battery,
 143 (g) Sections 784.045 and, 784.07(2)(d), ~~and 784.08(2)(a)~~,
 144 relating to aggravated battery,
 145 (h) Section 827.03(1), relating to child abuse,
 146 (i) Section 827.03(2), relating to aggravated child abuse,
 147 (j) Section 825.102(1), relating to abuse of an elderly
 148 person or disabled adult,
 149 (k) Section 825.102(2), relating to aggravated abuse of an
 150 elderly person or disabled adult,
 151 (l) Section 827.071, relating to sexual performance by
 152 person less than 18 years of age,
 153 (m) Sections 796.03, 796.07, and 796.08, relating to
 154 prostitution, or
 155 (n) Section 381.0041(11)(b), relating to donation of
 156 blood, plasma, organs, skin, or other human tissue,
 157
 158 the court shall order the offender to undergo HIV testing, to be
 159 performed under the direction of the Department of Health in
 160 accordance with s. 381.004, unless the offender has undergone
 161 HIV testing voluntarily or under ~~pursuant to~~ procedures
 162 established in s. 381.004(3)(h)6. or s. 951.27, or any other
 163 applicable law or rule providing for HIV testing of criminal
 164 offenders or inmates, subsequent to her or his arrest for an
 165 offense enumerated in paragraphs (a)-(n) for which she or he was
 166 convicted or to which she or he pled nolo contendere or guilty.
 167 The results of an HIV test performed on an offender under
 168 ~~pursuant to~~ this subsection are not admissible in any criminal

HB 399

2006

169 proceeding arising out of the alleged offense.

170 Section 7. Paragraphs (b), (c), (d), (e), (f), and (g) of
171 subsection (3) of section 921.0022, Florida Statutes, are
172 amended to read:

173 921.0022 Criminal Punishment Code; offense severity
174 ranking chart.--

175 (3) OFFENSE SEVERITY RANKING CHART

176	Florida	Felony	
	Statute	Degree	Description
177			(b) LEVEL 2
178	370.12(1)(e)3.	3rd	Possession of 11 or fewer marine turtle eggs in violation of the Marine Turtle Protection Act.
179	370.12(1)(e)4.	3rd	Possession of more than 11 marine turtle eggs in violation of the Marine Turtle Protection Act.
180	403.413(5)(c)	3rd	Dumps waste litter exceeding 500 lbs. in weight or 100 cubic feet in volume or any quantity for commercial purposes, or hazardous waste.
181	517.07	3rd	Registration of securities and furnishing of prospectus

HB 399

2006

			required.
182	590.28(1)	3rd	<u>Intentional or reckless burning</u> <u>of lands</u> Willful, malicious, or intentional burning.
183	784.05(3)	3rd	Storing or leaving a loaded firearm within reach of minor who uses it to inflict injury or death.
184	787.04(1)	3rd	In violation of court order, take, entice, etc., minor beyond state limits.
185	806.13(1)(b)3.	3rd	Criminal mischief; damage \$1,000 or more to public communication or any other public service.
186	810.061(2)	3rd	Impairing or impeding telephone or power to a dwelling; facilitating or furthering burglary.
187	810.09(2)(e)	3rd	Trespassing on posted commercial horticulture property.
188	812.014(2)(c)1	3rd	Grand theft, 3rd degree; \$300 or more but less than \$5,000.
189			

HB 399

2006

	812.014 (2) (d)	3rd	Grand theft, 3rd degree; \$100 or more but less than \$300, taken from unenclosed curtilage of dwelling.
190	812.015 (7)	3rd	Possession, use, or attempted use of an antishoplifting or inventory control device countermeasure.
191	817.234 (1) (a) 2	3rd	False statement in support of insurance claim.
192	817.481 (3) (a)	3rd	Obtain credit or purchase with false, expired, counterfeit, etc., credit card, value over \$300.
193	817.52 (3)	3rd	Failure to redeliver hired vehicle.
194	817.54	3rd	With intent to defraud, obtain mortgage note, etc., by false representation.
195	817.60 (5)	3rd	Dealing in credit cards of another.
196	817.60 (6) (a)	3rd	Forgery; purchase goods, services with false card.

F L O R I D A H O U S E O F R E P R E S E N T A T I V E S

HB 399

2006

197	817.61	3rd	Fraudulent use of credit cards over \$100 or more within 6 months.
198	826.04	3rd	Knowingly marries or has sexual intercourse with person to whom related.
199	831.01	3rd	Forgery.
200	831.02	3rd	Uttering forged instrument; utters or publishes alteration with intent to defraud.
201	831.07	3rd	Forging bank bills, checks, drafts, or promissory notes.
202	831.08	3rd	Possessing 10 or more forged notes, bills, checks, or drafts.
203	831.09	3rd	Uttering forged notes, bills, checks, drafts, or promissory notes.
204	831.11	3rd	Bringing into the state forged bank bills, checks, drafts, or notes.
205	832.05 (3) (a)	3rd	Cashing or depositing item with

HB 399

2006

			intent to defraud.
206	843.08	3rd	Falsely impersonating an officer.
207	893.13 (2) (a) 2.	3rd	Purchase of any s. 893.03 (1) (c), (2) (c) 1., (2) (c) 2., (2) (c) 3., (2) (c) 5., (2) (c) 6., (2) (c) 7., (2) (c) 8., (2) (c) 9., (3), or (4) drugs other than cannabis.
208	893.147 (2)	3rd	Manufacture or delivery of drug paraphernalia.
209			(c) LEVEL 3
210	119.10 (2) (b)	3rd	Unlawful use of confidential information from police reports.
211	316.066 (3) (d) - (f)	3rd	Unlawfully obtaining or using confidential crash reports.
212	316.193 (2) (b)	3rd	Felony DUI, 3rd conviction.
213	316.1935 (2)	3rd	Fleeing or attempting to elude law enforcement officer in patrol vehicle with siren and lights activated.
214	319.30 (4)	3rd	Possession by junkyard of motor vehicle with identification

HB 399

2006

215	319.33 (1) (a)	3rd	number plate removed.
216	319.33 (1) (c)	3rd	Alter or forge any certificate of title to a motor vehicle or mobile home.
217	319.33 (4)	3rd	Procure or pass title on stolen vehicle.
218	327.35 (2) (b)	3rd	With intent to defraud, possess, sell, etc., a blank, forged, or unlawfully obtained title or registration.
219	328.05 (2)	3rd	Felony BUI.
220	328.07 (4)	3rd	Possess, sell, or counterfeit fictitious, stolen, or fraudulent titles or bills of sale of vessels.
221	370.12 (1) (e) 5.	3rd	Manufacture, exchange, or possess vessel with counterfeit or wrong ID number.
			Taking, disturbing, mutilating, destroying, causing to be destroyed, transferring, selling, offering to sell, molesting, or harassing marine turtles, marine

HB 399

2006

			turtle eggs, or marine turtle nests in violation of the Marine Turtle Protection Act.
222	370.12(1)(e)6.	3rd	Soliciting to commit or conspiring to commit a violation of the Marine Turtle Protection Act.
223	376.302(5)	3rd	Fraud related to reimbursement for cleanup expenses under the Inland Protection Trust Fund.
224	400.903(3)	3rd	Operating a clinic without a license or filing false license application or other required information.
225	440.105(3)(b)	3rd	Receipt of fee or consideration without approval by judge of compensation claims.
226	440.1051(3)	3rd	False report of workers' compensation fraud or retaliation for making such a report.
227	501.001(2)(b)	2nd	Tampers with a consumer product or the container using materially false/misleading information.
228			

HB 399

2006

	624.401(4)(a)	3rd	Transacting insurance without a certificate of authority.
229	624.401(4)(b)1.	3rd	Transacting insurance without a certificate of authority; premium collected less than \$20,000.
230	626.902(1) (a) & (b)	3rd	Representing an unauthorized insurer.
231	697.08	3rd	Equity skimming.
232	790.15(3)	3rd	Person directs another to discharge firearm from a vehicle.
233	796.05(1)	3rd	Live on earnings of a prostitute.
234	806.10(1)	3rd	Maliciously injure, destroy, or interfere with vehicles or equipment used in firefighting.
235	806.10(2)	3rd	Interferes with or assaults firefighter in performance of duty.
236	810.09(2)(c)	3rd	Trespass on property other than structure or conveyance armed with firearm or dangerous weapon.
237	812.014(2)(c)2.	3rd	Grand theft; \$5,000 or more but

HB 399

2006

			less than \$10,000.
238	812.0145(2)(c)	3rd	Theft from person 65 years of age or older, \$300 or more but less than \$10,000.
239	815.04(4)(b)	2nd	Computer offense devised to defraud or obtain property.
240	817.034(4)(a)3	3rd	Engages in scheme to defraud (Florida Communications Fraud Act), property valued at less than \$20,000.
241	817.233	3rd	Burning to defraud insurer.
242	817.234(8) (b) - (c)	3rd	Unlawful solicitation of persons involved in motor vehicle accidents.
243	817.234(11)(a)	3rd	Insurance fraud; property value less than \$20,000.
244	817.236	3rd	Filing a false motor vehicle insurance application.
245	817.2361	3rd	Creating, marketing, or presenting a false or fraudulent motor vehicle insurance card.
246			

HB 399

2006

247	817.413 (2)	3rd	Sale of used goods as new.
248	817.505 (4)	3rd	Patient brokering.
249	828.12 (2)	3rd	Tortures any animal with intent to inflict intense pain, serious physical injury, or death.
250	831.28 (2) (a)	3rd	Counterfeiting a payment instrument with intent to defraud or possessing a counterfeit payment instrument.
251	831.29	2nd	Possession of instruments for counterfeiting drivers' licenses or identification cards.
252	838.021 (3) (b)	3rd	Threatens unlawful harm to public servant.
253	843.19	3rd	Injure, disable, or kill police dog or horse.
254	860.15 (3)	3rd	Overcharging for repairs and parts.
255	870.01 (2)	3rd	Riot; inciting or encouraging.
	893.13 (1) (a) 2.	3rd	Sell, manufacture, or deliver cannabis (or other s.

HB 399

2006

		893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs).
256	893.13(1)(d)2. 2nd	Sell, manufacture, or deliver s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs within 1,000 feet of university.
257	893.13(1)(f)2. 2nd	Sell, manufacture, or deliver s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs within 1,000 feet of public housing facility.
258	893.13(6)(a) 3rd	Possession of any controlled substance other than felony possession of cannabis.
259	893.13(7)(a)8. 3rd	Withhold information from practitioner regarding previous receipt of or prescription for a controlled substance.
260	893.13(7)(a)9. 3rd	Obtain or attempt to obtain

HB 399

2006

261	893.13(7)(a)10. 3rd	controlled substance by fraud, forgery, misrepresentation, etc.
262	893.13(7)(a)11. 3rd	Affix false or forged label to package of controlled substance.
263	893.13(8)(a)1. 3rd	Furnish false or fraudulent material information on any document or record required by chapter 893.
264	893.13(8)(a)2. 3rd	Knowingly assist a patient, other person, or owner of an animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations in or related to the practitioner's practice.
265	893.13(8)(a)3. 3rd	Employ a trick or scheme in the practitioner's practice to assist a patient, other person, or owner of an animal in obtaining a controlled substance.
266		Knowingly write a prescription for a controlled substance for a fictitious person.

HB 399

2006

	893.13 (8) (a) 4.	3rd	Write a prescription for a controlled substance for a patient, other person, or an animal if the sole purpose of writing the prescription is a monetary benefit for the practitioner.
267	918.13 (1) (a)	3rd	Alter, destroy, or conceal investigation evidence.
268	944.47 (1) (a) 1.-2.	3rd	Introduce contraband to correctional facility.
269	944.47 (1) (c)	2nd	Possess contraband while upon the grounds of a correctional institution.
270	985.3141	3rd	Escapes from a juvenile facility (secure detention or residential commitment facility).
271			(d) LEVEL 4
272	316.1935 (3) (a)	2nd	Driving at high speed or with wanton disregard for safety while fleeing or attempting to elude law enforcement officer who is in a patrol vehicle with siren and

HB 399

2006

			lights activated.
273	499.0051(1)	3rd	Failure to maintain or deliver pedigree papers.
274	499.0051(2)	3rd	Failure to authenticate pedigree papers.
275	499.0051(6)	2nd	Sale or delivery, or possession with intent to sell, contraband legend drugs.
276	784.07(2)(b)	3rd	Battery of law enforcement officer, firefighter, intake officer, etc.
277	784.074(1)(c)	3rd	Battery of sexually violent predators facility staff.
278	784.075	3rd	Battery on detention or commitment facility staff.
279	784.078	3rd	Battery of facility employee by throwing, tossing, or expelling certain fluids or materials.
280	784.08(2) <u>(a)</u> (e)	3rd	Battery on a person 65 years of age or older.
281	784.081(3)	3rd	Battery on specified official or

HB 399

2006

			employee.
282	784.082(3)	3rd	Battery by detained person on visitor or other detainee.
283	784.083(3)	3rd	Battery on code inspector.
284	784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.
285	787.03(1)	3rd	Interference with custody; wrongly takes child from appointed guardian.
286	787.04(2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.
287	787.04(3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
288	790.115(1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.
289	790.115(2)(b)	3rd	Possessing electric weapon or

HB 399

2006

			device, destructive device, or other weapon on school property.
290	790.115 (2) (c)	3rd	Possessing firearm on school property.
291	800.04 (7) (d)	3rd	Lewd or lascivious exhibition; offender less than 18 years.
292	810.02 (4) (a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
293	810.02 (4) (b)	3rd	Burglary, or attempted burglary, of an unoccupied conveyance; unarmed; no assault or battery.
294	810.06	3rd	Burglary; possession of tools.
295	810.08 (2) (c)	3rd	Trespass on property, armed with firearm or dangerous weapon.
296	812.014 (2) (c) 3.	3rd	Grand theft, 3rd degree \$10,000 or more but less than \$20,000.
297	812.014 (2) (c) 4.-10.	3rd	Grand theft, 3rd degree, a will, firearm, motor vehicle, livestock, etc.
298	812.0195 (2)	3rd	Dealing in stolen property by use

HB 399

2006

			of the Internet; property stolen \$300 or more.
299	817.563 (1)	3rd	Sell or deliver substance other than controlled substance agreed upon, excluding s. 893.03 (5) drugs.
300	817.568 (2) (a)	3rd	Fraudulent use of personal identification information.
301	817.625 (2) (a)	3rd	Fraudulent use of scanning device or reencoder.
302	828.125 (1)	2nd	Kill, maim, or cause great bodily harm or permanent breeding disability to any registered horse or cattle.
303	837.02 (1)	3rd	Perjury in official proceedings.
304	837.021 (1)	3rd	Make contradictory statements in official proceedings.
305	838.022	3rd	Official misconduct.
306	839.13 (2) (a)	3rd	Falsifying records of an individual in the care and custody of a state agency.
307			

HB 399

2006

308	839.13(2)(c)	3rd	Falsifying records of the Department of Children and Family Services.
309	843.021	3rd	Possession of a concealed handcuff key by a person in custody.
310	843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.
311	843.15(1)(a)	3rd	Failure to appear while on bail for felony (bond estreature or bond jumping).
312	874.05(1)	3rd	Encouraging or recruiting another to join a criminal street gang.
313	893.13(2)(a)1.	2nd	Purchase of cocaine (or other s. 893.03(1)(a), (b), or (d), (2)(a), (2)(b), or (2)(c)4. drugs).
314	914.14(2)	3rd	Witnesses accepting bribes.
315	914.22(1)	3rd	Force, threaten, etc., witness, victim, or informant.

HB 399

2006

	914.23 (2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.
316	918.12	3rd	Tampering with jurors.
317	934.215	3rd	Use of two-way communications device to facilitate commission of a crime.
318			(e) LEVEL 5
319	316.027 (1) (a)	3rd	Accidents involving personal injuries, failure to stop; leaving scene.
320	316.1935 (4) (a)	2nd	Aggravated fleeing or eluding.
321	322.34 (6)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
322	327.30 (5)	3rd	Vessel accidents involving personal injury; leaving scene.
323	381.0041 (11) (b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
324	440.10 (1) (g)	2nd	Failure to obtain workers'

HB 399

2006

			compensation coverage.
325	440.105 (5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.
326	440.381 (2)	2nd	Submission of false, misleading, or incomplete information with the purpose of avoiding or reducing workers' compensation premiums.
327	624.401 (4) (b) 2.	2nd	Transacting insurance without a certificate or authority; premium collected \$20,000 or more but less than \$100,000.
328	626.902 (1) (c)	2nd	Representing an unauthorized insurer; repeat offender.
329	790.01 (2)	3rd	Carrying a concealed firearm.
330	790.162	2nd	Threat to throw or discharge destructive device.
331	790.163 (1)	2nd	False report of deadly explosive or weapon of mass destruction.
332	790.221 (1)	2nd	Possession of short-barreled shotgun or machine gun.

HB 399

2006

333	790.23	2nd	Felons in possession of firearms, ammunition, or electronic weapons or devices.
334	800.04 (6) (c)	3rd	Lewd or lascivious conduct; offender less than 18 years.
335	800.04 (7) (c)	2nd	Lewd or lascivious exhibition; offender 18 years or older.
336	806.111 (1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
337	812.0145 (2) (b)	2nd	Theft from person 65 years of age or older, \$10,000 or more but less than \$50,000.
338	812.015 (8)	3rd	Retail theft; property stolen is valued at \$300 or more and one or more specified acts.
339	812.019 (1)	2nd	Stolen property; dealing in or trafficking in.
340	812.131 (2) (b)	3rd	Robbery by sudden snatching.
341	812.16 (2)	3rd	Owning, operating, or conducting a chop shop.
342			

HB 399

2006

	817.034(4)(a)2.	2nd	Communications fraud, value \$20,000 to \$50,000.
343	817.234(11)(b)	2nd	Insurance fraud; property value \$20,000 or more but less than \$100,000.
344	817.2341(1), (2)(a)&(3)(a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
345	817.568(2)(b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, \$5,000 or more or use of personal identification information of 10 or more individuals.
346	817.625(2)(b)	2nd	Second or subsequent fraudulent use of scanning device or reencoder.
347	825.1025(4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person

HB 399

2006

			or disabled adult.
348	827.071(4)	2nd	Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.
349	827.071(5)	3rd	Possess any photographic material, motion picture, etc., which includes sexual conduct by a child.
350	839.13(2)(b)	2nd	Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.
351	843.01	3rd	Resist officer with violence to person; resist arrest with violence.
352	847.0137(2)&(3)	3rd	Transmission of pornography by electronic device or equipment.
353	847.0138(2)&(3)	3rd	Transmission of material harmful to minors to a minor by electronic device or equipment.
354	874.05(2)	2nd	Encouraging or recruiting another

HB 399

2006

355	893.13 (1) (a) 1. 2nd	to join a criminal street gang; second or subsequent offense.
356	893.13 (1) (c) 2. 2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03 (1) (a), (1) (b), (1) (d), (2) (a), (2) (b), or (2) (c) 4. drugs).
357	893.13 (1) (d) 1. 1st	Sell, manufacture, or deliver cannabis (or other s. 893.03 (1) (c), (2) (c) 1., (2) (c) 2., (2) (c) 3., (2) (c) 5., (2) (c) 6., (2) (c) 7., (2) (c) 8., (2) (c) 9., (3), or (4) drugs) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center.
358	893.13 (1) (e) 2. 2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03 (1) (a), (1) (b), (1) (d), (2) (a), (2) (b), or (2) (c) 4. drugs) within 1,000 feet of university.

HB 399

2006

		cannabis or other drug prohibited under s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) within 1,000 feet of property used for religious services or a specified business site.
359	893.13(1)(f)1. 1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), or (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of public housing facility.
360	893.13(4)(b) 2nd	Deliver to minor cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs).
361		(f) LEVEL 6
362	316.193(2)(b) 3rd	Felony DUI, 4th or subsequent conviction.
363	499.0051(3) 2nd	Forgery of pedigree papers.
364		

HB 399

2006

	499.0051 (4)	2nd	Purchase or receipt of legend drug from unauthorized person.
365			
	499.0051 (5)	2nd	Sale of legend drug to unauthorized person.
366			
	775.0875 (1)	3rd	Taking firearm from law enforcement officer.
367			
	784.021 (1) (a)	3rd	Aggravated assault; deadly weapon without intent to kill.
368			
	784.021 (1) (b)	3rd	Aggravated assault; intent to commit felony.
369			
	784.041	3rd	Felony battery.
370			
	784.048 (3)	3rd	Aggravated stalking; credible threat.
371			
	784.048 (5)	3rd	Aggravated stalking of person under 16.
372			
	784.07 (2) (c)	2nd	Aggravated assault on law enforcement officer.
373			
	784.074 (1) (b)	2nd	Aggravated assault on sexually violent predators facility staff.
374			
	784.08 (2) (b)	2nd	Aggravated assault on a person 65 years of age or older.

HB 399

2006

375	784.081 (2)	2nd	Aggravated assault on specified official or employee.
376	784.082 (2)	2nd	Aggravated assault by detained person on visitor or other detainee.
377	784.083 (2)	2nd	Aggravated assault on code inspector.
378	787.02 (2)	3rd	False imprisonment; restraining with purpose other than those in s. 787.01.
379	790.115 (2) (d)	2nd	Discharging firearm or weapon on school property.
380	790.161 (2)	2nd	Make, possess, or throw destructive device with intent to do bodily harm or damage property.
381	790.164 (1)	2nd	False report of deadly explosive, weapon of mass destruction, or act of arson or violence to state property.
382	790.19	2nd	Shooting or throwing deadly missiles into dwellings, vessels,

HB 399

2006

			or vehicles.
383	794.011(8)(a)	3rd	Solicitation of minor to participate in sexual activity by custodial adult.
384	794.05(1)	2nd	Unlawful sexual activity with specified minor.
385	800.04(5)(d)	3rd	Lewd or lascivious molestation; victim 12 years of age or older but less than 16 years; offender less than 18 years.
386	800.04(6)(b)	2nd	Lewd or lascivious conduct; offender 18 years of age or older.
387	806.031(2)	2nd	Arson resulting in great bodily harm to firefighter or any other person.
388	810.02(3)(c)	2nd	Burglary of occupied structure; unarmed; no assault or battery.
389	812.014(2)(b)1.	2nd	Property stolen \$20,000 or more, but less than \$100,000, grand theft in 2nd degree.
390	812.015(9)	2nd	Retail theft; property stolen

HB 399

2006

			\$300 or more; second or subsequent conviction.
391	812.13(2)(c)	2nd	Robbery, no firearm or other weapon (strong-arm robbery).
392	817.034(4)(a)1.	1st	Communications fraud, value greater than \$50,000.
393	817.4821(5)	2nd	Possess cloning paraphernalia with intent to create cloned cellular telephones.
394	825.102(1)	3rd	Abuse of an elderly person or disabled adult.
395	825.102(3)(c)	3rd	Neglect of an elderly person or disabled adult.
396	825.1025(3)	3rd	Lewd or lascivious molestation of an elderly person or disabled adult.
397	825.103(2)(c)	3rd	Exploiting an elderly person or disabled adult and property is valued at less than \$20,000.
398	827.03(1)	3rd	Abuse of a child.
399	827.03(3)(c)	3rd	Neglect of a child.
400			

HB 399

2006

	827.071(2)&(3)	2nd	Use or induce a child in a sexual performance, or promote or direct such performance.
401	836.05	2nd	Threats; extortion.
402	836.10	2nd	Written threats to kill or do bodily injury.
403	843.12	3rd	Aids or assists person to escape.
404	847.0135(2)	3rd	Facilitates sexual conduct of or with a minor or the visual depiction of such conduct.
405	914.23	2nd	Retaliation against a witness, victim, or informant, with bodily injury.
406	944.35(3)(a)2.	3rd	Committing malicious battery upon or inflicting cruel or inhuman treatment on an inmate or offender on community supervision, resulting in great bodily harm.
407	944.40	2nd	Escapes.
408	944.46	3rd	Harboring, concealing, aiding escaped prisoners.

HB 399

2006

409	944.47(1)(a)5.	2nd	Introduction of contraband (firearm, weapon, or explosive) into correctional facility.
410	951.22(1)	3rd	Intoxicating drug, firearm, or weapon introduced into county facility.
411	(g) LEVEL 7		
412	316.027(1)(b)	2nd	Accident involving death, failure to stop; leaving scene.
413	316.193(3)(c)2	3rd	DUI resulting in serious bodily injury.
414	316.1935(3)(b)	1st	Causing serious bodily injury or death to another person; driving at high speed or with wanton disregard for safety while fleeing or attempting to elude law enforcement officer who is in a patrol vehicle with siren and lights activated.
415	327.35(3)(c)2.	3rd	Vessel BUI resulting in serious bodily injury.
416	402.319(2)	2nd	Misrepresentation and negligence

HB 399

2006

			or intentional act resulting in great bodily harm, permanent disfiguration, permanent disability, or death.
417	409.920 (2)	3rd	Medicaid provider fraud.
418	456.065 (2)	3rd	Practicing a health care profession without a license.
419	456.065 (2)	2nd	Practicing a health care profession without a license which results in serious bodily injury.
420	458.327 (1)	3rd	Practicing medicine without a license.
421	459.013 (1)	3rd	Practicing osteopathic medicine without a license.
422	460.411 (1)	3rd	Practicing chiropractic medicine without a license.
423	461.012 (1)	3rd	Practicing podiatric medicine without a license.
424	462.17	3rd	Practicing naturopathy without a license.
425			

HB 399

2006

	463.015 (1)	3rd	Practicing optometry without a license.
426	464.016 (1)	3rd	Practicing nursing without a license.
427	465.015 (2)	3rd	Practicing pharmacy without a license.
428	466.026 (1)	3rd	Practicing dentistry or dental hygiene without a license.
429	467.201	3rd	Practicing midwifery without a license.
430	468.366	3rd	Delivering respiratory care services without a license.
431	483.828 (1)	3rd	Practicing as clinical laboratory personnel without a license.
432	483.901 (9)	3rd	Practicing medical physics without a license.
433	484.013 (1) (c)	3rd	Preparing or dispensing optical devices without a prescription.
434	484.053	3rd	Dispensing hearing aids without a license.
435	494.0018 (2)	1st	Conviction of any violation of

HB 399

2006

436	560.123(8)(b)1. 3rd	ss. 494.001-494.0077 in which the total money and property unlawfully obtained exceeded \$50,000 and there were five or more victims.
437	560.125(5)(a) 3rd	Failure to report currency or payment instruments exceeding \$300 but less than \$20,000 by money transmitter.
438	655.50(10)(b)1. 3rd	Money transmitter business by unauthorized person, currency or payment instruments exceeding \$300 but less than \$20,000.
439	775.21(10)(a) 3rd	Failure to report financial transactions exceeding \$300 but less than \$20,000 by financial institution.
440	775.21(10)(b) 3rd	Sexual predator; failure to register; failure to renew driver's license or identification card; other registration violations.
		Sexual predator working where children regularly congregate.

HB 399

2006

441	775.21(10)(g)	3rd	Failure to report or providing false information about a sexual predator; harbor or conceal a sexual predator.
442	782.051(3)	2nd	Attempted felony murder of a person by a person other than the perpetrator or the perpetrator of an attempted felony.
443	782.07(1)	2nd	Killing of a human being by the act, procurement, or culpable negligence of another (manslaughter).
444	782.071	2nd	Killing of human being or viable fetus by the operation of a motor vehicle in a reckless manner (vehicular homicide).
445	782.072	2nd	Killing of a human being by the operation of a vessel in a reckless manner (vessel homicide).
446	784.045(1)(a)1.	2nd	Aggravated battery; intentionally causing great bodily harm or disfigurement.
447			

HB 399

2006

	784.045 (1) (a) 2.	2nd	Aggravated battery; using deadly weapon.
448	784.045 (1) (b)	2nd	Aggravated battery; perpetrator aware victim pregnant.
449	784.048 (4)	3rd	Aggravated stalking; violation of injunction or court order.
450	784.048 (7)	3rd	Aggravated stalking; violation of court order.
451	784.07 (2) (d)	1st	Aggravated battery on law enforcement officer.
452	784.074 (1) (a)	1st	Aggravated battery on sexually violent predators facility staff.
453	784.08 (2) (a)	1st	Aggravated battery on a person 65 years of age or older.
454	784.081 (1)	1st	Aggravated battery on specified official or employee.
455	784.082 (1)	1st	Aggravated battery by detained person on visitor or other detainee.
456	784.083 (1)	1st	Aggravated battery on code inspector.
457			

HB 399

2006

458	790.07(4)	1st	Specified weapons violation subsequent to previous conviction of s. 790.07(1) or (2).
459	790.16(1)	1st	Discharge of a machine gun under specified circumstances.
460	790.165(2)	2nd	Manufacture, sell, possess, or deliver hoax bomb.
461	790.165(3)	2nd	Possessing, displaying, or threatening to use any hoax bomb while committing or attempting to commit a felony.
462	790.166(3)	2nd	Possessing, selling, using, or attempting to use a hoax weapon of mass destruction.
463	790.166(4)	2nd	Possessing, displaying, or threatening to use a hoax weapon of mass destruction while committing or attempting to commit a felony.
464	796.03	2nd	Procuring any person under 16 years for prostitution.
464	800.04(5)(c)1.	2nd	Lewd or lascivious molestation; victim less than 12 years of age;

HB 399

2006

		offender less than 18 years.
465	800.04 (5) (c) 2. 2nd	Lewd or lascivious molestation; victim 12 years of age or older but less than 16 years; offender 18 years or older.
466	806.01 (2) 2nd	Maliciously damage structure by fire or explosive.
467	810.02 (3) (a) 2nd	Burglary of occupied dwelling; unarmed; no assault or battery.
468	810.02 (3) (b) 2nd	Burglary of unoccupied dwelling; unarmed; no assault or battery.
469	810.02 (3) (d) 2nd	Burglary of occupied conveyance; unarmed; no assault or battery.
470	812.014 (2) (a) 1. 1st	Property stolen, valued at \$100,000 or more; property stolen while causing other property damage; 1st degree grand theft.
471	812.014 (2) (b) 2. 2nd	Property stolen, cargo valued at less than \$50,000, grand theft in 2nd degree.
472	812.014 (2) (b) 3. 2nd	Property stolen, emergency medical equipment; 2nd degree

HB 399

2006

			grand theft.
473	812.0145(2)(a)	1st	Theft from person 65 years of age or older; \$50,000 or more.
474	812.019(2)	1st	Stolen property; initiates, organizes, plans, etc., the theft of property and traffics in stolen property.
475	812.131(2)(a)	2nd	Robbery by sudden snatching.
476	812.133(2)(b)	1st	Carjacking; no firearm, deadly weapon, or other weapon.
477	817.234(8)(a)	2nd	Solicitation of motor vehicle accident victims with intent to defraud.
478	817.234(9)	2nd	Organizing, planning, or participating in an intentional motor vehicle collision.
479	817.234(11)(c)	1st	Insurance fraud; property value \$100,000 or more.
480	817.2341(2)(b) & (3)(b)	1st	Making false entries of material fact or false statements regarding property values relating to the solvency of an

HB 399

2006

			insuring entity which are a significant cause of the insolvency of that entity.
481	825.102(3)(b)	2nd	Neglecting an elderly person or disabled adult causing great bodily harm, disability, or disfigurement.
482	825.103(2)(b)	2nd	Exploiting an elderly person or disabled adult and property is valued at \$20,000 or more, but less than \$100,000.
483	827.03(3)(b)	2nd	Neglect of a child causing great bodily harm, disability, or disfigurement.
484	827.04(3)	3rd	Impregnation of a child under 16 years of age by person 21 years of age or older.
485	837.05(2)	3rd	Giving false information about alleged capital felony to a law enforcement officer.
486	838.015	2nd	Bribery.
487	838.016	2nd	Unlawful compensation or reward for official behavior.

HB 399

2006

488	838.021(3)(a)	2nd	Unlawful harm to a public servant.
489	838.22	2nd	Bid tampering.
490	847.0135(3)	3rd	Solicitation of a child, via a computer service, to commit an unlawful sex act.
491	872.06	2nd	Abuse of a dead human body.
492	893.13(1)(c)1.	1st	Sell, manufacture, or deliver cocaine (or other drug prohibited under s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center.
493	893.13(1)(e)1.	1st	Sell, manufacture, or deliver cocaine or other drug prohibited under s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., within 1,000 feet of property used for religious services or a specified business

HB 399

2006

			site.
494	893.13 (4) (a)	1st	Deliver to minor cocaine (or other s. 893.03 (1) (a), (1) (b), (1) (d), (2) (a), (2) (b), or (2) (c) 4. drugs).
495	893.135 (1) (a) 1.	1st	Trafficking in cannabis, more than 25 lbs., less than 2,000 lbs.
496	893.135 (1) (b) 1.a.	1st	Trafficking in cocaine, more than 28 grams, less than 200 grams.
497	893.135 (1) (c) 1.a.	1st	Trafficking in illegal drugs, more than 4 grams, less than 14 grams.
498	893.135 (1) (d) 1.	1st	Trafficking in phencyclidine, more than 28 grams, less than 200 grams.
499	893.135 (1) (e) 1.	1st	Trafficking in methaqualone, more than 200 grams, less than 5 kilograms.
500	893.135 (1) (f) 1.	1st	Trafficking in amphetamine, more than 14 grams, less than 28 grams.
501			

HB 399

2006

502	893.135 (1) (g) 1.a.	1st	Trafficking in flunitrazepam, 4 grams or more, less than 14 grams.
503	893.135 (1) (h) 1.a.	1st	Trafficking in gamma- hydroxybutyric acid (GHB), 1 kilogram or more, less than 5 kilograms.
504	893.135 (1) (j) 1.a.	1st	Trafficking in 1,4-Butanediol, 1 kilogram or more, less than 5 kilograms.
505	893.135 (1) (k) 2.a.	1st	Trafficking in Phenethylamines, 10 grams or more, less than 200 grams.
506	896.101 (5) (a)	3rd	Money laundering, financial transactions exceeding \$300 but less than \$20,000.
507	896.104 (4) (a) 1.	3rd	Structuring transactions to evade reporting or registration requirements, financial transactions exceeding \$300 but less than \$20,000.
	943.0435 (4) (c)	2nd	Sexual offender vacating permanent residence; failure to

HB 399

2006

			comply with reporting requirements.
508	943.0435 (8)	2nd	Sexual offender; remains in state after indicating intent to leave; failure to comply with reporting requirements.
509	943.0435 (9) (a)	3rd	Sexual offender; failure to comply with reporting requirements.
510	943.0435 (13)	3rd	Failure to report or providing false information about a sexual offender; harbor or conceal a sexual offender.
511	943.0435 (14)	3rd	Sexual offender; failure to report and reregister; failure to respond to address verification.
512	944.607 (9)	3rd	Sexual offender; failure to comply with reporting requirements.
513	944.607 (10) (a)	3rd	Sexual offender; failure to submit to the taking of a digitized photograph.
514	944.607 (12)	3rd	Failure to report or providing

HB 399

2006

515	944.607(13)	3rd	false information about a sexual offender; harbor or conceal a sexual offender.
516			Sexual offender; failure to report and reregister; failure to respond to address verification.
517	Section 8. This act shall take effect July 1, 2006.		

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 425 CS Florida Trust Code
SPONSOR(S): Mahon; Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1170

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	7 Y, 0 N, w/CS	Shaddock	Bond
2) Elder & Long-Term Care Committee		Walsh <i>TW</i>	Walsh <i>TW</i>
3) Economic Development, Trade & Banking Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. Committee Substitute for HB 425 repeals Chapter 737, F.S., and creates Chapter 736, F.S., a comprehensive new trust code loosely modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The CS includes the requirements for trust creation, the treatment of revocable trusts, and the rights of creditors within this new Trust Code. Some current provisions of the trust code -- in particular, those dealing with representation and with trust modification, termination and reformation -- are updated and expanded.

The CS proposes significant changes to current law including:

- A lower standard for collecting child support and alimony notwithstanding spendthrift provisions of a trust;
- A person who receives a trust distribution is deemed to submit to personal jurisdiction of Florida courts on any matter involving the distribution by simply accepting a distribution from the trust;
- A presumption that a trust is revocable unless the terms specifically provide that the trust is irrevocable;
- A trustee who commits a breach of trust is liable for the greater of the profit made by reason of the breach and the amount required to restore the trust to the position it would have been in had the breach not occurred;
- Trust modifications that currently require court approval may be effective upon agreement of the parties to the trust without court approval; and
- A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company and receiving additional compensation for that investment.

The CS does not appear to have a fiscal impact on state or local governments.

The CS specifies that the Code takes effect on July 1, 2007, and includes specific rules relating to retroactive application.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill will provide a trustee with additional flexibility in administering a trust.

Safeguard Individual Liberty -- This bill increases the options of an individual, organization or association regarding the conduct of his/her own affairs in the trust arena.

Personal Responsibility -- This bill expands the ability of a person to collect alimony and child support from an obligor who is the beneficiary of a trust.

B. EFFECT OF PROPOSED CHANGES:¹

Background

A trust is generally defined as:

a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.²

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."³ The term "trustee" as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another.⁴ "Trustee" refers to "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."⁵

Trusts may be classified as express trusts or as trusts by operation of law. Another classification of trusts, from the aspect of whether they become effective after the death of the settlor or during his or her life, is into testamentary and *inter vivos* trusts. Express trusts have been divided into passive trusts, sometimes known as "nominal" or "dry" trusts, and active trusts, otherwise called "live" or "operative" trusts. Trusts may also be classified as either private or charitable.⁶

¹ The bulk of this analysis is specifically derived from "Florida Trust Code Executive Summary" and "Florida Trust Code Scrivener's Summary" which was graciously supplied by The Ad Hoc Trust Code Revision Committee, hereinafter referred to as the "Committee". The Committee labored for four years to prepare a thorough new trust code for Florida. The Committee was co-chaired by Brian J. Felcoski and Laird A. Lile. Other members included William F. Belcher, Debra L. Boje, Sandra F. Diamond, Robert W. Goldman, John G. Grimsley, Rohan Kelley, William R. Lane, Jr., William T. Marks, Barry F. Spivey, F. Gordon Spoor, Laura P. Stephenson, Bruce M. Stone, Donald R. Tescher, Marjorie E. Wolasky and G. Charles Wohlust. Professor David F. Powell of the Florida State University College of Law served as Committee Scrivener.

² 55A Fla. Jur. 2d Trusts s.1.

³ Section 731.201(17), F.S.

⁴ 90 C.J.S. Trusts s.2.

⁵ Section 731.201(35), F.S.

⁶ 55A Fla. Jur. 2d Trusts s.2.

An express trust is a trust intentionally created by the direct and positive act of the settlor, by some writing, deed, or will, or oral declaration. Express trusts are distinguishable from trusts by operation of law, resulting and constructive, in that the latter are respectively founded on an intention of the parties to a transaction implied in law, or on fraud or wrong irrespective of the intention of the parties concerned.⁷

Chapter 737, F.S., which is entitled "Trust Administration," is the current statutory scheme that governs trusts. This chapter encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. It also sets forth the default rules for trust administration which can generally be limited or altered by the settlor.

CS for HB 425 repeals Chapter 737, F.S., and creates Chapter 736, F.S., a comprehensive new trust code loosely modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The CS includes the requirements for trust creation, the treatment of revocable trusts, and the rights of creditors within this new Trust Code. Some current provisions of the trust code -- in particular, those dealing with representation and with trust modification, termination and reformation -- are updated and expanded.

What Is Different Under CS for HB 425?⁸

By way of preview, the following is a brief catalogue of some of the more important changes CS for HB 425 (hereinafter "FTC" or "Code") makes to existing Florida law. Each of these is examined in greater depth later in this Analysis.

- **Representation:** The FTC includes the very useful representation provisions found in the Uniform Code but expands the provision dealing with representation by a holder of a power of appointment⁹ and adds a new provision permitting a settlor to designate a representative (e.g., a trust protector).¹⁰
- **Trust Creation:** The requirement that trusts containing land be evidenced by a signed writing is affirmed; the unique Florida requirement that the testamentary aspects of trusts be executed with the formalities required for a will is limited to revocable trusts;¹¹ and the capacity needed to create a revocable trust is specified to be the same as that required for the execution of a will.¹²
- **Trust Modification:** In general, the FTC includes the Uniform Code provisions dealing with trust creation, modification and termination, although UTC section 411, which has been the subject of considerable discussion on estate planning list serves, was replaced with Florida's existing trust modification provisions.¹³
- **Charitable Trusts:** The authority the Attorney General has at common law to enforce charitable trusts is codified¹⁴ and standing to enforce charitable trusts is extended to the settlors

⁷ *Id.* at s.8

⁸ The Committee estimated that Florida Trust Code is comprised about 40 percent of provisions found in prior Florida law and about 60 percent of provisions based on the Uniform Trust Code (the Uniform Trust Code of 2000 has been enacted in fifteen states and is under consideration in several others). Of the provisions in this latter group, almost a third were revised in some substantive respect.

⁹ See s. 736.0302, F.S. discussed *infra* at p. 14.

¹⁰ See s. 736.0306, F.S. discussed *infra* at p. 15.

¹¹ See s. 736.0403, F.S. discussed *infra* at p. 18.

¹² See s. 736.0601, F.S. discussed *infra* at p. 28.

¹³ See ss. 736.4113 - .412, F.S. discussed *infra* beginning at p. 20.

¹⁴ See s. 736.0110(3), F.S.

who create them¹⁵ and to charitable organizations designated in an instrument to receive distributions from them.¹⁶

- **Creditor's Rights:** For trusts created after the effective date of the Code, a spendthrift clause must restrain both voluntary and involuntary alienation,¹⁷ and the exceptions for child support and alimony are no longer "last resort" exceptions.¹⁸ Note that the Code does NOT permit the creation of self-settled asset protection trusts or adversely affect the asset protection features of third-party trusts.
- **Revocable Trusts:** With respect to revocable trusts, the Code provides that trusts are revocable by default,¹⁹ that a method of revocation expressed in an instrument is exclusive,²⁰ and that while a trust is revocable, the trustee owes duties only to the settlor.²¹ This last principle also applies when a beneficiary has a right of withdrawal over trust property. That is, a holder of a right of withdrawal is treated as a settlor while the power is exercisable.²²
- **Affiliated Services:** A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company²³ and receiving additional compensation for that investment.²⁴
- **Miscellaneous and Conforming:** The existing antilapse statute for *inter vivos* trusts is replaced with a new provision more broadly applicable to the descendibility of future interests in both testamentary and *inter vivos* trusts;²⁵ the Worthier Title Doctrine is abolished;²⁶ sections 731.103 (evidence of death or status) and 731.201, F.S. (definitions) now apply to chapter 736; a new definition for "power of appointment" has been added to section 731.201, F.S.; section 731.303, F.S. (representation) no longer applies to proceedings involving trusts; and section 732.603, F.S. (antilapse) now applies only to outright devises and appointments.²⁷

What Is the Same?

The short answer is quite a lot. As was mentioned previously, almost 40 percent of the Code consists of provisions carried over from chapter 737, F.S. with either no or only slight modification. An informative but nonexclusive list of these carryover provisions includes:

- Section 737.204, F.S. dealing with the employment of agents and the review of compensation.²⁸
- Section 737.206, F.S. dealing with the effect of fraud, duress, mistake and undue influence.²⁹

¹⁵ See s. 736.0405(3), F.S.

¹⁶ See s. 736.0110(1), F.S.

¹⁷ See s. 736.0502(1), F.S., discussed *infra* at p. 26.

¹⁸ See s. 736.0503(2), F.S., discussed *infra* at p. 26.

¹⁹ See s. 736.0602(1), F.S., discussed *infra* at p. 29.

²⁰ See s. 736.0602(3)(b), F.S., discussed *infra* at p.30 .

²¹ See s. 736.0603(1), F.S., discussed *infra* at p. 29.

²² See s. 736.0603(2), F.S., discussed *infra* at p. 29.

²³ See s. 736.0802(5), F.S., discussed *infra* at p. 39.

²⁴ See s. 736.0802(5), F.S..

²⁵ See s. 736.0926, F.S., discussed *infra* at p. 56.

²⁶ See s. 689.175, F.S., discussed *infra* at p. 62. Black's defines this doctrine as "[t]he common-law doctrine that if a beneficiary of a will would receive an identical interest as an heir under the laws of intestacy, the person takes the interest as an heir rather than as a beneficiary." Black's Law Dictionary, 1639 (rev. 8th ed. 2004).

²⁷ See s. 732.603, F.S., discussed *infra* at p. 55.

²⁸ See s. 736.0206, F.S., discussed *infra* at p. 12.

²⁹ See s. 736.0406, F.S., discussed *infra* at p. 16.

- Sections 737.4031 and 737.4032, F.S. dealing with judicial and nonjudicial modification of trusts.³⁰
- Sections 737.3054 and 737.308, F.S. dealing with a trustee's duty to pay the expenses and obligations of a settlor's estate and to provide a notice of trust at the settlor's death.³¹
- Section 737.306(6), F.S. dealing with the protection of successor trustees.³²
- Section 737.3035, F.S. dealing with the contents of a trust accounting.³³
- Section 737.402(4), F.S. dealing with certain powers involving a conflict of interest.³⁴
- Section 737.4025, F.S. dealing with powers relating to environmental and human health and contaminated property.³⁵
- Section 737.208, F.S. dealing with administration pending the outcome of a contest or other proceeding.³⁶
- Sections 737.727, 737.2035, and 737.2041, F.S. dealing with costs and fees.³⁷
- Sections 737.307 and 737.3061, F.S. dealing with limitations on actions against trustees in general and against a revocable trust, its beneficiaries and its trustees after the settlor's death.³⁸
- Section 737.209, F.S. dealing with liability for improper distributions.³⁹

There is much more that is the same. For example, the above list makes no mention of a trustee's powers to split and merge trusts, not because such powers are not important, but because the Code uses the UTC provision in this area, rather than the provision from Chapter 737, F.S. There are numerous other instances of the same thing. The discussion that begins next tells a more complete story.

The Code in Depth

In the interest of uniformity, the Florida Trust Code borrows its structure from the Uniform Trust Code.⁴⁰ The Code consists of 13 parts, which correspond in title and content to the eleven articles that make up

³⁰ See ss. 736.04113 through .0412, F.S., discussed *infra* beginning at p. 20.

³¹ See ss. 736.0505 and .05055, F.S., discussed *infra* at p. 28.

³² See s. 736.08125, F.S., discussed *infra* at p. 40.

³³ See s. 736.08135, F.S., discussed *infra* at p. 41.

³⁴ See s. 736.0814(2) and (3), F.S., discussed *infra* at p. 44.

³⁵ See s. 736.08163, F.S., discussed *infra* at p. 42.

³⁶ See s. 736.08165, F.S., discussed *infra* at p. 37.

³⁷ See s. 736.0904 through .09047, F.S., discussed *infra* at p. 48.

³⁸ See s. 736.0905 and .09103, F.S., discussed *infra* at pp. 50.

³⁹ See s. 736.0914, F.S., discussed *infra* at p. 47.

⁴⁰ To the extent possible, the Code also borrows its section numbering scheme from the UTC. For example, FTC section 736.0101 covers the same subject as UTC section 101, FTC s. 736.0102 the same as UTC s. 102, etc. In the many instances where an FTC section is identical to or is based on a corresponding section of the UTC, the extensive comments to the UTC section provide important additional guidance and authority. The parallel numbering scheme used in the FTC should facilitate reference to the appropriate UTC comment. Unfortunately though, it was not possible to continue the parallel numbering scheme throughout the entire Code. Under the numbering scheme used in the UTC, a section such as 1010 would appear in Article Ten. Under the numbering scheme dictated by the Florida statutes, a section 736.01010 would appear in Part I, somewhere between sections 736.0101 and 736.0102. Accordingly, the desired parallelism between the two codes breaks down beginning with Part X of the Code.

the Uniform Code, plus two additional parts covering rules of construction and charitable trusts respectively.

GENERAL PROVISIONS AND DEFINITIONS (PART I)

Among the more important things,⁴¹ the several sections of Part I of the FTC address the scope and applicability of the Code;⁴² the meaning of important terms;⁴³ and the relative weight to be given to the Code, common law, and the terms of a trust.⁴⁴ Also covered are the rules defining when a person or an organization is considered to have knowledge of a fact;⁴⁵ the methods of giving and waiving notice;⁴⁶ the rules for determining and changing a trust's principal place of administration;⁴⁷ and the validity and permissible scope of nonjudicial settlement agreements.⁴⁸

Scope and Applicability

The "scope" of the Code is identical to that of Chapter 737, F.S. It applies to charitable and noncharitable express trusts and to trusts created by statute, judgment or court decree. It does not apply to implied trusts,⁴⁹ business trusts, land trusts, or to any other arrangement that does not meet the definition of a trust under s. 731.201(34), F.S.⁵⁰ Consistent with that, and except as otherwise provided in Part XIII or in a particular section, the provisions of the Code apply retroactively to all Florida trusts.⁵¹

For express trusts having contacts in more than one jurisdiction, the Code provides that the law of the jurisdiction designated in the terms of the trust provided there is a sufficient nexus to the designate jurisdiction at the time of creation of the trust or during the trust administration.⁵² In the absence of a designation in the terms of the trust, the law of the jurisdiction where the settlor resided at the time the trust was created is controlling.⁵³ However, a designation in the terms of the trust is not controlling as to any matter for which the designation would be contrary to the strong public policy of Florida.⁵⁴

Important Definitions

Section 736.0103, F.S. includes definitions for terms that are used in more than one section of the Code. These definitions are supplemented by other definitions in individual Code sections and by the definitions found in s. 731.201, F.S. which a conforming amendment makes applicable to new Chapter 736, F.S.

⁴¹ Sections 736.0101 and 736.0112, F.S. are not discussed in this summary. The former merely specifies a citation form and internal title for the Florida Trust Code. Section 736.0112, F.S. dispenses with local qualification for certain foreign trustees who receive distributions from a local estate. The section is identical to s. 737.105, F.S.

⁴² See s. 736.0102, F.S.

⁴³ See s. 736.0103, F.S.

⁴⁴ See s. 736.0105 and .0106, F.S.

⁴⁵ See s. 736.0104, F.S.

⁴⁶ See s. 736.0109, F.S.

⁴⁷ See s. 736.0108, F.S.

⁴⁸ See s. 736.0111, F.S.

⁴⁹ I.e., resulting and constructive trusts.

⁵⁰ See s. 736.0102, F.S.

⁵¹ On the retroactive application of the Code, see "

Effective date", infra p. 61.

⁵² The designation is ineffective if it is contrary to a strong public policy of this state. See s. 736.0107(3), F.S.

⁵³ In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust was first created will control. Section 736.0107(2), F.S. With respect to any particular matter, the designation is not effective if it is contrary to a strong public policy of this state. Section 736.0107(3), F.S.

⁵⁴ Section 736.0107(3), F.S.

Beneficiaries and Qualified Beneficiaries

Most of the definitions in s. 736.0103, F.S. are sufficiently obvious or straightforward that there is little need to examine them directly. The terms "beneficiary" and "qualified beneficiary," however, are used so pervasively throughout the Code that extended examination of these terms is desirable. And it is informative, at least, to catalog a few other terms as well.

Beneficiary: The term "beneficiary" refers to the universe of persons who have a beneficial interest in a trust as well as to any person who has a power of appointment over trust property in a capacity other than as trustee.⁵⁵ It is immaterial for this purpose whether the beneficial interest is present or future, vested or contingent, or whether the person having the interest is ascertainable or even living.⁵⁶

Example 1 — Meaning of Beneficiary. At his death, ninety-year-old D leaves \$1,000,000 to T as trustee "to pay the income to D's spouse S for life, then to distribute trust property to such of D's descendants as S by will appoints, and in default of appointment in continuing trust to spray income among D's children from time to time living, and at the death of the last to distribute all trust property *per stirpes* to D's then living descendants and if there be none, to D's alma mater, QB University." D is survived by S, by two children, C1 and C2, by a grandson Bob (C1's child) and by a great-granddaughter Fay (Bob's child). On these facts, the beneficiaries of D's trust include S, C1, C2, Bob, Fay, QB University, and an indeterminate and unascertainable class of as yet unborn descendants of D. Note that T's power to spray trust income among D's children does not make T a beneficiary because T holds that power as a trustee.⁵⁷

Qualified Beneficiary: The term "beneficiary" is to be contrasted with "qualified beneficiary."⁵⁸ The latter encompasses only a limited subset of all trust beneficiaries. In effect the class is limited to living persons who are current beneficiaries, intermediate beneficiaries, and first line remainder beneficiaries, whether vested or contingent.⁵⁹ An example may be helpful.

Example 2 — Meaning of Qualified Beneficiary. Same facts as **Example 1**. The qualified beneficiaries of D's trust, *as of his death*, include S, C1, C2 and Bob. S is included because she is a permissible distributee.⁶⁰ C1 and C2 are included because they would become permissible distributees were S's interest to terminate at D's death (i.e., were she to die at that time).⁶¹ Bob is also a qualified beneficiary because he would take the trust property were the trust to terminate at D's death (because of the death of S, C1 and C2).⁶² As of D's death, neither Fay nor QB University are qualified beneficiaries. Note however, that if Bob were to die after D's death, Fay would then become a qualified

⁵⁵ See s. 736.0103(3), F.S.

⁵⁶ Nor is it relevant how the person acquired the beneficial interest. The term 'beneficiary' includes persons who received their interests by assignment, exercise of a power of appointment, resulting trust, or by operation of an antilapse statute. See generally the discussion of "beneficiary" in the comments to UTC s. 103.

⁵⁷ Suppose S's power in this example extended to D's descendants and their spouses. Would a current or future spouse of the descendants be beneficiaries by virtue of the fact that they are permissible objects of S's power? The better answer is no because, under traditional property law, the objects of a power of appointment have no beneficial interest in the property subject to the power; they have a mere expectancy.

⁵⁸ It is this latter term that the Code employs in the various provisions dealing with notice and consent.

⁵⁹ More precisely, the term includes only living beneficiaries who are either present distributees (or present permissible distributees) of trust income or principal or who would become present or permissible distributees if the interests of present distributees or the trust itself terminated on the date the class of qualified beneficiaries is being determined. See s. 736.0103(14), F.S.

⁶⁰ Section 736.0105(14)(a), F.S.

⁶¹ Section 736.0105(14)(b), F.S.

⁶² Section 736.0105(14)(c), F.S.

beneficiary because she would be entitled to trust property as a consequence of a hypothetical trust termination at that time. That is, the determination of who is a qualified beneficiary is made as of a specific point in time and can change over time.

Charitable trusts are created to benefit the community at large rather than for the benefit of ascertainable beneficiaries. Accordingly, the comments to UTC section 103 adopt the view that persons, including designated charitable organizations, receiving distributions from charitable trusts are not beneficiaries as that term is used in the Code. As a consequence, charitable trusts have no qualified beneficiaries.⁶³ To address this concern:

- The Code extends the rights of a qualified beneficiary to any charitable organization expressly designated to receive distributions from a charitable trust if the organization would otherwise meet the definition of a qualified beneficiary.⁶⁴
- In addition, the Code authorizes the Attorney General⁶⁵ to assert the rights of a qualified beneficiary with respect to charitable trusts.⁶⁶

Other Important Terms

Much can be gained by browsing the other terms defined in s. 736.0103, F.S.:

- The term "affiliate" is defined as any person or entity that directly or indirectly through one or more intermediaries owns or controls, is owned or controlled by, or is under common control or ownership, with the fiduciary.⁶⁷
- The term "settlor" includes anyone who either creates or transfers property to a trust, including a testator;⁶⁸
- The term "trustee" includes additional, successor, and cotrustees;⁶⁹
- A trust is "revocable" if it is revocable by the settlor without the consent of either the trustee or an adverse person;⁷⁰
- A power of appointment⁷¹ is a "general power" if it is exercisable in favor of its holder, the holder's estate, or the creditors of either the holder or the holder's estate;⁷²

⁶³ A similar problem exists with trusts for the care of animals or for a specific noncharitable purpose, neither of which have ascertainable beneficiaries, but both of which are validated by other provisions of the Code. See s. 736.0408 (trust for animal) and s. 736.0409, F.S. (noncharitable trust without ascertainable beneficiary). The Code addresses this issue by extending the rights of a qualified beneficiary to any person appointed to enforce an animal or noncharitable purpose trust. See s. 736.0110(2), F.S.

⁶⁴ See s. 736.0110(1), F.S. The rights referred to in the section are the right to information and the right to participate in actions taken with the consent of the qualified beneficiaries.

⁶⁵ The Committee had extensive discussion about giving the Attorney General the rights of a qualified beneficiary with respect to charitable trusts. On the one hand, the Committee recognized the common law authority of the Attorney General to police charitable trusts on behalf of the public. On the other hand, the Committee saw no advantage to requiring trustees to send unwanted and unneeded information to the Attorney General. The approach adopted in the Code is a compromise. Under the Code, a trustee of a charitable trust has no duty to send notices, information, accountings, etc. to the Attorney General unless and until he or she asserts the rights of a qualified beneficiary with respect to the trust.

⁶⁶ See s. 736.0110(3), F.S.

⁶⁷ See s. 736.0103(2), F.S.

⁶⁸ See s. 736.0103(16), F.S.

⁶⁹ See s. 736.0103(21), F.S.

⁷⁰ See s. 736.0103(15), F.S.

- The term “power of withdrawal” excludes powers exercisable by trustees “as trustee” and powers exercisable by others only with the consent of a trustee or a person having an adverse interest;⁷³
- The definition of “ascertainable standard” tracks that used in the federal transfer tax system. It means a standard relating to health, education, support, or maintenance;⁷⁴
- The term “trust instrument” refers to a written instrument executed by a settlor which contains the original or amended terms of a trust.⁷⁵ This should be contrasted with the more expansive “terms of a trust” includes both the terms specified in a trust instrument and such terms as might be established by other evidence admissible in a judicial proceeding; and⁷⁶
- The term “interest of the beneficiaries” refers to the collective beneficial interests of a trust as opposed to the individual interests or concerns of the beneficiaries.⁷⁷

Sources of Trust Law; Default and Mandatory Rules

Although it is more comprehensive than Chapter 737, F.S., the Code does not try to anticipate all possible issues that can arise with respect to trusts. Instead, for matters not addressed in the Code, section 736.0106, F.S. provides that the Code is supplemented by the common law of trusts and by principles of equity.

The Code can, and usually will, be supplemented by the terms of a trust as well. Or, more accurately, the terms of the trust will be supplemented by the Code. The latter is more accurate because the provisions of the Code are default rules that apply only in the absence of a contrary provision in the terms of the trust.⁷⁸ Thus, as a general matter, a settlor is free to limit, expand, or override any Code provision. There are exceptions, of course, and all of the exceptions are listed in s. 736.0105(2), F.S. The exclusive list of exceptions found there can be organized into the following broad categories:

- Those relating to the requirements for the creation of a trust including trust formalities⁷⁹ and the requirement that the purpose of a trust be lawful, possible to achieve, and not contrary to public policy.⁸⁰
- Those containing public policy restrictions on the designation of a principal place of administration⁸¹ and the effect of penalty,⁸² spendthrift,⁸³ and exculpatory clauses.⁸⁴

⁷¹ A conforming amendment to s. 731.201, F.S. defines “power of appointment” to be “an authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.” Accord, Restatement (Second) of Property: Donative Transfers s. 11.1 (1986).

⁷² See s. 736.0103(6), F.S.

⁷³ See s. 736.0103(12), F.S.

⁷⁴ See s. 736.0103(2), F.S.

⁷⁵ See s. 736.0103(20), F.S.

⁷⁶ See s. 736.0103(19), F.S. The difference between the two concepts can be seen in the context of an oral trust of personal property. Such a trust would have terms but no instrument.

⁷⁷ See s. 737.0103(9), F.S.

⁷⁸ See s. 736.0105(1), F.S.

⁷⁹ See s. 736.0105(2)(a), F.S.

⁸⁰ See s. 736.0105(2)(c), F.S.

⁸¹ See s. 736.0105(2)(p), F.S.

⁸² See s. 736.0105(2)(u), F.S.

⁸³ See s. 736.0105(2)(e), F.S.

⁸⁴ See s. 736.0105(2)(k), F.S.

- Those covering procedural matters including jurisdiction,⁸⁵ venue,⁸⁶ and limitations on commencing judicial actions.⁸⁷
- Those dealing with court powers, including the power to adjust a trustee's compensation,⁸⁸ to act in the interests of justice,⁸⁹ to require, dispense with, modify, or terminate a trustee's bond,⁹⁰ and, except as otherwise provided elsewhere in the Code, the power to modify or terminate a private or charitable trust.⁹¹
- Those dealing with the duties of a trustee, including the duty to act in good faith and in accordance with the terms of the trust;⁹² the duty to notify, account to⁹³, and respond to requests for information by qualified beneficiaries;⁹⁴ and with respect to a revocable trust, the duty to file a notice of trust at the death of the settlor⁹⁵ and to pay the expenses and obligations of the settlor's estate.⁹⁶
- Certain miscellaneous provisions including one giving qualified beneficiaries and the trustee of a dynasty trust the power to amend or terminate the trust⁹⁷ and another specifying the rights of third parties who interact with the trust, such as bona fide purchasers, tort or contractual claimants.⁹⁸

Principal Place of Administration

The Code imposes a duty on a trustee to administer the trust at a place that is appropriate to its purposes and administration.⁹⁹ Subject to that duty, upon appropriate notice to the qualified beneficiaries, a trustee may move a trust's principal place of administration to another State or jurisdiction.¹⁰⁰

⁸⁵ See s. 736.0105(2)(o), F.S.

⁸⁶ *Id.*

⁸⁷ See s. 736.0105(2)(m), F.S.

⁸⁸ See s. 736.0105(2)(g), F.S.

⁸⁹ See s. 736.0105(2)(n), F.S.

⁹⁰ See s. 736.0105(2)(f), F.S.

⁹¹ See s. 736.0105(2)(d), F.S.

⁹² See s. 736.0105(2)(b), F.S.

⁹³ The committee expressed the following comment. If the experience of other jurisdictions is an indication, it is likely that the mandatory provisions dealing with the duty to account and to provide information to qualified beneficiaries will be the subject of keen interest and discussion. This is understandable because these provisions involve a necessary balancing between a settlor's control and privacy interests on the one hand and the competing interest the beneficiaries have in accessing the information necessary protect their interests on the other. More is said about this elsewhere in this Summary. See *Representation; Privacy; and the Right to Information*, *infra* at p.16. By way of preview, however, the Florida Code balances these interests differently from the Uniform Code in three important respects. First, the duty the UTC imposes on a trustee to notify qualified beneficiaries of the existence of the trust, the identity of the trustee, and their right to reports is mandatory only with respect to qualified beneficiaries who have attained age 25. The FTC makes no distinction based on the age of qualified beneficiaries. Compare UTC s. 105(b)(8) with s. 736.0105(2)(h), F.S. Second, the UTC gives all beneficiaries a right to request reports and information reasonably related to the administration of the trust. Under the FTC, all rights to accountings, reports and information and to a copy of the trust instrument itself are restricted to qualified beneficiaries. Compare UTC s. 813(a) and 105(b)(9) with s. 736.0813, F.S., discussed *infra* p. 41. Finally, revisions and additions to the representation provisions in Part III of the Code provide a means by which settlors can effectively withhold information from one or more qualified beneficiaries. See ss. 736.0302 and 736.0306, F.S., discussed *infra* at pp. 14 and 15, respectively.

⁹⁴ See ss. 736.0105(2)(h) – (j), F.S.

⁹⁵ See s. 736.0105(2)(t), F.S.

⁹⁶ See s. 736.0105(2)(s), F.S.

⁹⁷ See s. 736.0105(2)(r), F.S.

⁹⁸ See s. 736.0105(2)(l), F.S.

⁹⁹ Section 736.0108(4), F.S.

¹⁰⁰ See s. 736.0108(5), F.S. The contents of the required notice is set out in s. 736.0108(6), F.S.

In the absence of a valid designation in the trust instrument, s. 736.0108, F.S. retains existing Florida statutory law which provides that a trust's principal place of administration is the trustee's usual place of business, if any; otherwise the trustee's residence.¹⁰¹ In addition, the section validates trust provisions designating a principal place of administration, provided the designated jurisdiction has a sufficient nexus to the trust or its beneficiaries.¹⁰²

Factual Knowledge

Section 736.0104, F.S. clarifies when a person is considered to have knowledge of a fact. That occurs if the person has actual knowledge of the fact, has received a notice or notification of it, or, under all of the facts and circumstances known to the person, has reason to know it.¹⁰³ With respect to an organization operating through employees, the organization has notice or knowledge of a fact involving a trust only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the trust or the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence.¹⁰⁴

Methods and Waiver of Notice

Section 736.0109, F.S. provides that notice of judicial proceedings is to be given as provided in the Florida Rules of Civil Procedure.¹⁰⁵ Other notices and the sending of required documents must be accomplished in a reasonably suitable manner that is likely to result in receipt.¹⁰⁶ Notice and the sending of documents are not required for persons whose identity or location is not reasonably ascertainable by the trustee¹⁰⁷ or who have waived the sending of the notice or document.¹⁰⁸

Nonjudicial Settlement Agreements

Under the Code, interested persons¹⁰⁹ may enter into a binding nonjudicial settlement agreement¹¹⁰ with respect to any trust matter, provided:

- The terms and conditions of the agreement could be properly approved by a Court were court approval sought;¹¹¹ and

¹⁰¹ See s. 736.0108(2). Additional guidance dealing with cotrustees and the impact of interstate mergers tracks existing Florida statutory law on these subjects. Compare ss. 736.0108(2) and (3), F.S. with s. 737.101(1)-(3), F.S.

¹⁰² The nexus requirement is mandatory. See s. 736.0105(2)(f), F.S. It is satisfied if the designated jurisdiction is the trustee's residence or principal place of business or a jurisdiction where all or part of the administration occurs. Other jurisdictions are judged on a case by case basis. See s. 736.0108(1), F.S.

¹⁰³ Section 736.0104(1), F.S.

¹⁰⁴ Section 736.0104(2), F.S. This may be a change in Florida law as there are some cases that suggest a stricter standard for organizations acting through employees. See e.g., *St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670 (Fla. 1950); *Harris v. Lewis State Bank*, 436 So. 2d 338 (Fla. 1st DCA 1983).

¹⁰⁵ Section 736.0108(4), F.S.

¹⁰⁶ See s. 736.0108(1), particularly the last sentence which contains a list of acceptable methods, including a properly directed facsimile or other electronic message.

¹⁰⁷ Section 736.0108(2), F.S.

¹⁰⁸ Section 736.0108(3), F.S.

¹⁰⁹ In this context, interested persons is defined to be those persons whose interest would be affected by the settlement. Section 736.0111(1), F.S.

¹¹⁰ Corporate trustees are quick to note the usefulness of nonjudicial settlement agreements in harmonious situations to avoid the expense and delays of formal accountings at the termination of a trust. They can be useful in a variety of other contexts as well. For a nonexclusive list of matters that can be resolved by a nonjudicial settlement agreement, see s. 736.0111(4), F.S. One can only assume that the comfort level banks have with this technique will increase under the Code, both because settlement agreements are now authorized by statute and because the representation provisions in Part III should make it easier to get all interested persons "on board."

¹¹¹ Court approval may be requested by any interested person. Section 736.0111(5), F.S.

- The agreement does not produce a result that is not authorized under other provisions of the Code.¹¹²

Qualifications of Foreign Trustee

The Code dispenses with local qualifications for certain foreign trustees who receive distributions from a local estate.¹¹³

JUDICIAL PROCEEDINGS (PART II)

Part II collects in one place a number of the rules applicable to judicial proceedings involving the validity, administration, and distribution of trusts.¹¹⁴ Among these are provisions that affirm that, in the absence of a court order, trusts are not subject to continuing judicial supervision;¹¹⁵ that proceedings involving the validity, administration, or distribution of trusts are commenced by complaint and are governed by the Florida Rules of Civil Procedure;¹¹⁶ and that the circuit court has original jurisdiction with respect to all matters arising under the Code.¹¹⁷

Sticking with the familiar, Part II also incorporates verbatim four provisions found in Chapter 737, F.S. These include:

- Section 736.0204, F.S. dealing with venue for actions and proceedings concerning trusts.¹¹⁸ The section is identical to s. 737.202, F.S.¹¹⁹
- Section 736.0205, F.S. dealing with the dismissal of trust proceedings involving matters relating to foreign trusts. The section is identical to s. 737.203, F.S.
- Section 736.0206, F.S., providing for notice and other rules relating to proceedings for the review of the employment of agents and the compensation of the trustee and trust employees. The section is identical to s. 737.204, F.S.
- Section 736.0207, F.S. preventing actions to contest the validity of a trust while it remains revocable. This aspect of the section is identical to s. 737.2065, F.S. In addition, s. 736.0207, F.S. includes a new exception for court approved actions by the guardian of the property of an incompetent settlor.

Lastly, s. 736.0202, F.S.¹²⁰ deals with personal jurisdiction over the trustee, beneficiaries, and recipients of trust distributions. The methods of obtaining jurisdiction detailed in the section are not exclusive.¹²¹ With respect to a trust having its principal place of administration in Florida, s. 736.0202, F.S. provides that:

¹¹² See s. 736.0111(2) and (3), F.S.

¹¹³ Section 737.105, F.S., is essentially identical to s. 736.0112, F.S.

¹¹⁴ For a nonexclusive list of possible judicial proceedings, see s. 736.0201(4), F.S. The power of courts to take actions in judicial proceedings involving trusts may not be changed in a trust instrument. See s. 736.0105(2)(n), F.S.

¹¹⁵ See s. 736.0201(3), F.S.

¹¹⁶ See s. 736.0201(1), F.S.

¹¹⁷ See s. 736.0203, F.S. This is a mandatory provision. See s. 736.0105(2)(o), F.S.

¹¹⁸ This is a mandatory provision. See s. 736.0105(2)(o), F.S.

¹¹⁹ Venue lies in any county where it is proper under chapter 47, F.S., where the plaintiff or defendant beneficiary resides or has its principal place of business, or where the trust has its principal place of administration.

¹²⁰ Chapter 737, F.S. has no provision corresponding to s. 736.0602, F.S. Jurisdiction under existing law is obtained under the general long arm statutes found in ch. 48, F.S. The Committee believes that the inclusion of a long arm statute tailored specifically to trust matters is a beneficial addition to Florida law.

¹²¹ Section 736.0202(3), F.S.

- A trustee submits to the jurisdiction of Florida courts either by accepting the trusteeship or by moving the principal place of administration to this state;
- The beneficiaries are subject to the jurisdiction of Florida courts with respect to any matter involving the trust; and
- Recipients who accept a distribution from a trust submit personally to the jurisdiction of Florida courts regarding any matter involving the distribution.^{122 123}

REPRESENTATION (PART III)

Part III of the Code includes, with some important modifications, the representation provisions of the Uniform Code. Of all of the Code, the representation provisions should be among the most useful because they facilitate planning and the efficient administration of trusts.

Background

In the context in which it is used here, "representation" refers to the authority of one person to act on behalf of another.¹²⁴ Under the Code, notice, information, accountings and reports sent to a representative have the same effect as those sent to the person being represented. And actions taken by a representative bind the person being represented to the same extent as actions taken by the person being represented.¹²⁵

Types of Representation

The Code recognizes several different types of representation. Two of these – representation by holders of powers of appointment and by persons designated by the settlor in the trust instrument itself – present special considerations and are discussed in greater detail later. The remaining representation types include:

- **Fiduciary:** This category includes those provisions which permit a guardian of the property to represent a ward;¹²⁶ an attorney-in-fact to represent a principal;¹²⁷ and a trustee or personal

¹²² Section 736.0202, F.S. is a mandatory provision. See s. 736.0105(2)(o), F.S.

¹²³ More is said about this provision for personal jurisdiction in the Constitutional Issues section, *infra* at p. 67.

¹²⁴ The concept of representation is not new to Florida law. Section 731.303, F.S. provides for limited representation in the administration of, or in judicial proceedings involving, decedent's estates and trusts. If the FTC is enacted, a conforming amendment to s. 731.303, F.S., will restrict its application to decedent's estates so all representation regarding trusts will be controlled by the provisions in the FTC. But the Code representation provisions are more extensive. They permit representatives to initiate or consent to actions and to receive accountings and information in both judicial and nonjudicial contests. They apply generically across all provision of the Code. And to a limited extent, they apply to settlors as well as to beneficiaries. See e.g., s. 736.0301(3), F.S. providing that notice or consent given to or by a representative of an incapacitated settlor is binding of the settlor's behalf.

¹²⁵ See s. 736.0301(1) and (2), F.S. Section 301(b) of the Uniform Trust Code provides that the consent of a representative is binding on the person being represented "*unless the person represented objects to the representation before the consent would otherwise have become effective.*" (emphasis added). The comments to the section suggest that, at least with respect to competent adults, the qualification may be constitutionally required. Despite this, section 736.0301 does not include a similar limitation because the Committee believes that the constitutional requirement may not apply with equal force to all types of representation. It may be that representation over the objection of the person being represented violates due process in all cases. It is also possible, however, that representation by the holder of a power of appointment (or by a settlor designated representative) is distinguishable because the underlying rationale for these types of representation is found either in an equivalency with ownership or in the settlor's intent. See note 135 *infra* p. 14. The Committee omitted the explicit limitation because it did not wish to preempt the issue.

¹²⁶ See ss. 736.0303(1) and (2), F.S.

¹²⁷ See s. 736.0303(3), F.S.

representative to represent the beneficiaries of a trust or estate, as the case may be.¹²⁸ The Code also provides that a parent may represent an unborn or minor child if no guardian of the property has been appointed.¹²⁹

- **Virtual:** If not otherwise represented, a minor, incapacitated, unborn, unascertainable or unlocatable person may be represented by another person having a substantially identical interest.¹³⁰ The classic example of virtual representation involves the representation of minor beneficiaries of a class gift by other adult members of the class.
- **Court appointed:** The court may appoint a representative for a person the court determines is not otherwise adequately represented.¹³¹ A court appointed guardian ad litem would be an example of this category of representation. Uniquely, in making decisions, a court appointed representative may take into consideration benefits accruing to living members of the family of the represented individual.¹³²

Limits on Representation

With two notable exceptions, representation under the Code is available only to the extent there is no conflict of interest between the representative and the person being represented. Representation by holders of powers of appointment and by settlor-designated persons are the exceptions. As detailed more fully below, the former are subject to a fraud or bad faith restriction; the latter are restricted more directly by limitations on who may be designated as a representative.

Special Florida Provisions

Representation by Holders of a Power of Appointment

Section 736.0302, F.S. provides that a holder of a power of appointment may represent and bind the objects and takers in default of the power. As is the case with the representation provision found in the Probate Code,¹³³ but unlike the corresponding provision in the Uniform Trust Code¹³⁴ s. 736.0302, F.S. makes no distinction between general and nongeneral powers.¹³⁵ Representation applies to the holders of either.¹³⁶

¹²⁸ See ss. 736.0303(4) and (5), F.S.

¹²⁹ See s. 736.0303(6), F.S.

¹³⁰ See s. 736.0304, F.S.

¹³¹ See s. 736.0305(1), F.S.

¹³² See s. 736.0305(3), F.S.

¹³³ See s. 731.303(1), F.S.

¹³⁴ Compare UTC s. 302.

¹³⁵ Even so, the rationale supporting this type of representation varies with the type of power. For general powers, the rationale lies in the essential equivalency of these powers to ownership. The Committee believes the same rationale supports representation in the case of broadly drafted nongeneral powers, such as a testamentary power to appoint to anyone in the world except the holder of the power, the estate of the holder or the creditors of either. The restrictions on the objects of this type of power exist for tax purposes only.

The supporting rationale for more restrictive nongeneral powers is different. A commonly encountered example of this type of power would be a trust "to pay the income to spouse for life, then to distribute principal to such of settlor's descendants as spouse appoints by will with gift in default of appointment to the descendants *per stirpes*." In the Committee's view, these powers are used either because existing Florida law permits their use as a means to cut off the flow of information about the trust to the remaindermen during the life tenant's life or because they add flexibility to the trust disposition. In either case, practically speaking, holders of this type of power act as an agent of the creator of the power. If a settlor has sufficient confidence in the holder of a limited nongeneral power to vest him or her with the authority to determine the beneficial ownership of trust property, there is every reason to assume that the settlor would want the power holder to represent the objects and takers in default in other respects. Hence, representation by the holder of a limited special power is a mere manifestation of a principle expressed more formally elsewhere in the Code¹³⁵ that a trust settlor should be able to designate persons to serve as representatives of trust beneficiaries.

¹³⁶ Nor does s. 736.0302, F.S. make a distinction between presently exercisable (i.e. *inter vivos*) and testamentary powers. Note though, that no question of representation arises when a trust beneficiary has a presently exercisable

The Fraud and Bad Faith Limitation

As it turns out, one of the most discussed questions relating to the representation provision dealing with power holders was whether representation should be precluded if the power holder has a conflict of interest with the objects or takers in default. The Uniform Trust Code contains such a restriction. Explicitly and structurally at least, s. 731.303, F.S. of the Probate Code does not. It was the Committee's belief that incorporating a conflict of interest limitation would change existing Florida law.

Discussion on this point centered on the common situation where a life tenant of a trust is given a power to appoint trust property by will. The case for including a conflict of interest limitation can be found in the concern that, without one, as a representative of the objects and takers in default, the power holder could approve acts that improperly benefit his or her life interest.¹³⁷ The case against including a conflict limitation is found in the shared view of many on the Committee that the limitation would preclude most representation by holders of powers as there would usually be some conflict between the power holder and the objects and takers in default.

The Committee decided to include a provision precluding representation by power holders in matters involving fraud or bad faith by the trustee instead of one dealing more broadly with conflicts of interest. Ultimately, the Committee hoped that a good faith trustee will resist any attempt by the holder of a nongeneral or testamentary power to enhance his or her life interest.¹³⁸

Powers Held by Trustees

Section 736.0302, F.S. places two other restrictions on the ability of a power holder to represent others under part III of the Code. Both address the same concern – that trustees not be in a position to approve their own actions and accountings. Thus, s. 736.0302, F.S. does not apply to the distribution powers of a trustee.¹³⁹ Nor may a beneficiary with a power represent others while the beneficiary is serving as sole trustee.¹⁴⁰

Designated Representatives

Within limits discussed below, s. 736.0306, F.S. allows a settlor to appoint or designate a person to represent and bind a trust beneficiary or to receive notices, information, reports and accounts on the beneficiary's behalf. This section, which has no counterpart in the Uniform Code, contemplates that the designated representative could be appointed directly by the settlor or by others (such as a committee) pursuant to a process set out in the trust instrument. In either case, a person serving as a designated representative is not a fiduciary. He or she is not liable for acts or omissions made in good faith.

Trustee May Not Serve as Designated Representative

Section 736.0306, F.S. places two important restrictions on the authority of a designated representative to represent and bind a trust beneficiary. The first of these is that a designated representative who is also a trustee may not represent or bind a trust beneficiary while serving in that capacity.¹⁴¹ This is a mandatory restriction that cannot be waived in the trust instrument.¹⁴²

general power of appointment. If such a case, the trustee's duties would be owed exclusively to the power holder; as long as the power remained exercisable, other trust beneficiaries would have no rights to represent. See s. 736.0603, F.S.

¹³⁷ The Committee was of the view that this is an unlikely possibility where a corporate trustee is involved. But not all trusts have corporate trustee, and the possibility that the trustee is also the holder of the power, is a particular concern.

¹³⁸ In a conforming amendment, a fraud and bad faith restriction was also added to s. 731.301(1), F.S.

¹³⁹ Section 736.0302(2)(b), F.S.

¹⁴⁰ Section 736.0302(2)(c), F.S.

¹⁴¹ Section 736.0306(2), F.S.

¹⁴² See s. 736.0105(2)(h), F.S.

Certain Beneficiaries Serving as Designated Representatives

The second restriction, which is also mandatory,¹⁴³ applies to designated representatives who are also beneficiaries of the trust. Although there is no blanket prohibition on a beneficiary serving as a designated representative, the Code does restrict the situations where this is allowed. A beneficiary may serve as a designated representative only if:

- The beneficiary is designated by the settlor by name (as opposed to by others pursuant to a process detailed in the trust instrument); or
- The designated representative/beneficiary is a spouse, grandparent, or descendant of a grandparent of either the beneficiary being represented or that beneficiary's spouse.¹⁴⁴

Representation; Privacy; and the Right to Information

Reference was made previously to the balance the Code attempts to make between a settlor's privacy and control interests on the one hand, and the interests qualified beneficiaries have in accessing trust information on the other. Because, the trustee's duty to notify, account to, and respond to requests for information by qualified beneficiaries is mandatory, a settlor may not directly affect this duty in the trust instrument. Nevertheless, with the judicious use of the representation provisions, particularly the power of appointment and designated representative provisions, it should be possible to prevent one or more qualified beneficiaries from gaining access to information the settlor does not wish them to have.¹⁴⁵

TRUST CREATION, VALIDITY, MODIFICATION AND TERMINATION (PART IV)

The first several sections of Part IV of the Code gather together what would be considered by most to be the traditional common law of trusts. The balance of Part IV covers the important area of trust modification, termination and reformation. Some of these later provisions are codifications of existing Florida statutes. Others find their source in the Uniform Code.

Trust Creation and Validity

Under the Code, a trust may be created by *inter vivos* or testamentary transfer, by a settlor's self declaration of trust, or by the exercise of a power of appointment.¹⁴⁶ In broad outline and subject to further refinement below, to create a trust a settlor having the capacity to do so¹⁴⁷ must intend to create a trust¹⁴⁸ for a purpose that is lawful, consistent with public policy and possible to achieve.¹⁴⁹ The trust must not be passive, meaning that the trustee must have enforceable duties to perform.¹⁵⁰ A trust or any portion of a trust is void to the extent the trust or trust portion is procured by fraud, duress, mistake, or undue influence.¹⁵¹

¹⁴³ See *Id.*

¹⁴⁴ See ss. 736.0306(3)(a) and (b), F.S.

¹⁴⁵ Although a settlor may be motivated by a desire to restrict access to information about a trust, the settlor's intent in this regard is merely precatory. That is, a trustee who gives notices, accountings, etc., directly to a person who is represented by another under the Code is not individually liable for doing so. Section 736.0301(5), F.S.

¹⁴⁶ Section 736.0401, F.S.

¹⁴⁷ Section 736.0402(1)(a), F.S.

¹⁴⁸ Section 736.0402(1)(b), F.S.

¹⁴⁹ Section 736.0404, F.S.

¹⁵⁰ Section 736.0402(1)(d), F.S. Accord, *Elvins v. Seestedt*, 141 Fla. 266, 193 So. 54, 126 A.L.R. 1001 (1940); *Watson v. St. Petersburg Bank and Trust Company*, 146 So.2d 383 (Fla. 2d DCA 1962); *Baum v. Corn*, 167 So.2d 740 (Fla. 2d DCA 1964). The requirement that the trustee's duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust. Section 736.0402(1)(e), F.S. Accord, *Wiley v. Hoggson*, 90 Fla. 343, 106 So. 408 (1925).

¹⁵¹ Section 736.0406, F.S.

Ascertainable Beneficiaries

In addition to the above, a private trust must have ascertainable beneficiaries.¹⁵² That said, it is not necessary that the beneficiaries be alive at the creation of a trust. It is sufficient if they can be ascertained at some point in the future within the period of the Rule against Perpetuities.¹⁵³ If a class of beneficiaries is ascertainable (such as descendants), the shares of each may be left to the discretion of the trustee.¹⁵⁴

Charitable trusts

A trust may be created for a charitable purpose (e.g., the relief of poverty, the advancement of arts, sciences, education or religion, or the promotion of health, governmental or municipal purposes).¹⁵⁵ The ascertainable beneficiary requirement does not apply to such trusts¹⁵⁶ because the enforcement of charitable trusts is provided by other mechanisms.¹⁵⁷

Trust for the care of animals

A trust may be created to provide for the care of one or more animals alive during the settlor's lifetime.¹⁵⁸ The trust lasts until the death of the last surviving animal at which time any remaining trust property is distributed as provided in the terms of the trust, or in the absence of such a provision, to the settlor, if living, otherwise as part of the settlor's estate.¹⁵⁹

The settlor of an animal trust may designate someone to enforce the trust. In the absence of such a designation, the court will appoint a person to enforce the trust.¹⁶⁰ In either case, the presence of a designated enforcer (so to speak) means that an animal trust does not need ascertainable beneficiaries.

¹⁵² Section 736.0402(1)(c), F.S. The reason is obvious enough. It is the beneficiaries who have standing to enforce the trust, and beneficiaries, courts, and trustees alike need to know who they are.

¹⁵³ Section 736.0402(2), F.S.

¹⁵⁴ In a departure from orthodox common law, a power of a trustee to select from a class of indefinite beneficiaries (such as friends) is not invalid under the Code. Instead, the trustee is given a reasonable time to make a selection. If the trustee fails to do so, the trustee's power fails and the property passes to those who would have taken it had the power never been conferred. Section 736.0402(3), F.S. Accord, Restatement (Third) of Trusts s. 46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 122 (1959); Restatement (Second) of Property: Donative Transfers s. 12.1 cmt. e (1986). In this regard, the Code overrules *Kunce v. Robinson*, 469 So.2d 874 (Fla. 3rd DCA 1985).

¹⁵⁵ Section 736.0405(1), F.S. Where the intent to create a charitable trust is present but the terms of the trust do not indicate a particular purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. Section 736.0405(3), F.S.

¹⁵⁶ Section 736.0402(1)(c)1, F.S.

¹⁵⁷ Although not stated explicitly, the Code continues the common law rule that charitable trusts are enforced by the state Attorney General. See s. 736.0110(3), F.S. under which the Attorney General may assert the right of a qualified beneficiary with respect to charitable trusts. In addition, the rights of a qualified beneficiary are given to charitable organizations expressly designated to receive distributions under the terms of a charitable trust. See s. 736.0110(1), F.S. Finally, in a departure from common law, the Code gives settlors standing to enforce the charitable trusts they create. Section 736.0405(3), F.S.

¹⁵⁸ See generally, s. 736.0408, F.S. This provision is similar to s. 737.116, F.S.

¹⁵⁹ See s. 736.0408(1) and (3), F.S. Except to the extent the court determines that the property in the trust exceeds that necessary to accomplish the purposes of the trust, property in an animal trust may be applied only to its intended use.

¹⁶⁰ An action to request the appointment of someone to enforce an animal trust, or to remove a person serving in that capacity may be brought by anyone having an interest in the welfare of the animal. Section 736.0408(2), F.S.

Trusts for general or specific noncharitable purpose

In much the same way that the Code validates trusts for the care of animals, it also validates (for 21 years) trusts for a general or specific noncharitable purpose.¹⁶¹ Like animal trusts, trusts for a noncharitable purpose are enforced by a person designated by the settlor in the terms of the trust, or, in the absence of such a designee, by a person appointed by the court.¹⁶² Hence, this type of trust need not have ascertainable beneficiaries either.¹⁶³

Trust Formalities

A testamentary trust is valid only if the will in which it is contained is valid. With two important exceptions discussed next, an *inter vivos* trust is validly created under the Code if its creation complies either with the law of the place where it was executed or the law where the settlor was domiciled at the time of creation.¹⁶⁴ Thus, where either the execution situs or the settlor's domicile is a jurisdiction other than Florida, the Code can validate a trust that does not comply with Florida law. In the common case of a trust executed in Florida by a Florida domiciliary, however, the trust must comply with the requirements for a trust in Florida.¹⁶⁵

Irrevocable trusts

Neither existing Florida law nor the Code require a writing to create a trust of personal property. Irrevocable oral trusts of personal property are enforceable¹⁶⁶ provided only that their terms can be established by clear and convincing evidence.¹⁶⁷ Trusts containing Florida real property, however, must be evidenced by a signed writing.¹⁶⁸

Revocable trusts

Nominally, revocable trusts are subject to the same rules. Practically speaking, however, revocable trusts present special considerations. In the first place, most plans involving revocable trusts also involve wills with pourover clauses. Under s. 732.513(1), F.S., a pourover clause is invalid unless the recipient trust is evidenced by a written instrument. More importantly, since 1995, s. 737.111, F.S. has

¹⁶¹ Section 736.0409(1), F.S. An example of a trust for a general noncharitable purpose would be a trust where the trustee is directed to apply the income annually "to such worthy purposes as the trustee selects." An example of a trust for a specific noncharitable purpose would be one where the trustee is directed to spend trust funds for the saying of masses for the settlor and his deceased spouse. Accord Restatement (Third) of Trusts, s. 47 (2003), cmt. d(1). It is worth noting, though, that this Code provision will not apply to the two most common types of trusts for a specific noncharitable purpose. These, respectively, are trusts for the care of animals, which are covered separately in Code s. 736.0409, F.S. discussed above, and trusts for the care and maintenance of cemetery plots, which, under Florida law are deemed to be charitable. See s. 689.13, F.S. The significance of this section is that trusts for the care and maintenance of cemetery plots are not subject to the twenty-one year limitation in Code section 736.0409(1); they may be perpetual.

¹⁶² Section 736.0409(2), F.S. Also like an animal trust, except to the extent the court determines that the value of the property is excessive, trust property must be applied for its intended use and any property not required for that purpose must be distributed as provided in the terms of the trust or in the absence of such terms, to the settlor, if living otherwise to the settlor's estate. Section 736.0409(3), F.S.

¹⁶³ Section 736.0402(1)(c)3, F.S.

¹⁶⁴ Section 736.0403(1), F.S.

¹⁶⁵ The formalities discussed in this portion of the analysis do not apply to certain trusts established as part of deferred compensation plans. See s. 736.0403(3), F.S.

¹⁶⁶ Section 736.0407, F.S. Accord, *Bay Biscayne Co. v. Baile*, 73 Fla. 1120, 75 So. 860 (1917); *In re Estate of Pearce*, 481 So.2d 69 (Fla. 4th DCA 1986).

¹⁶⁷ Florida cases state the standard of evidentiary proof somewhat differently from s. 736.0407, F.S. See *Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative*, 52 So.2d 670, 674 (Fla. Sup. Ct. 1951) ("clear, positive and almost conclusive"); *Bailey v. Baron*, 269 So.2d 45, 47 (Fla. 3d DCA 1972, rev'd on other grounds 275 So.2d 519 (Fla. Sup. Ct. 1973)) ("clear, strong, conclusive and unequivocal"). The Committee believes the standards expressed in these cases is functionally equivalent to the "clear and convincing" standard in s. 736.0407, F.S.

¹⁶⁸ See s. 736.0403(2)(a), F.S. providing that trusts containing land must comply with s. 689.05, F.S.

provided that the testamentary aspects of most trusts¹⁶⁹ are void unless the trusts are executed with the formalities required for a will.¹⁷⁰ Similar requirements are imposed by section 736.0403(2)(b) of the Code, but only with respect to revocable trusts¹⁷¹ created by Florida domiciliaries¹⁷² on or after the effective date of the Code.¹⁷³ The practical bottom line then is that, under the Code, if revocable trusts are to serve the function they are intended to serve – to pass property at the death of the settlor to others – they must be executed with the formalities required for a will.

These basics aside, there are aspects to the application of section 736.0403(2)(b), F.S. that may not be apparent from a casual reading. These include the following:

- The section applies both at the creation of a revocable trust and to any subsequent amendments.¹⁷⁴
- A failure to comply with the requirements of s. 736.0403(2)(b), F.S. does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate."¹⁷⁵
- The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.
- Section 736.0403(2)(b), F.S. has no applicability to trusts created by non Florida domiciliaries whether or not the trust was executed in Florida.¹⁷⁶
- Conversely, s. 736.0403(2)(b), F.S. does not contain an "out" for trusts executed in other states. The section applies to revocable trusts created by Florida domiciliaries regardless of the place of execution and regardless of the location of the property held in the trust.¹⁷⁷

Trust Modification and Termination

In addition to provisions dealing with the requisites for a trust, Part IV of the Code includes important and useful provisions covering the modification, termination and reformation of trusts. The first three of these provisions discussed below, are rewrites of Florida's existing trust modification statutes. The remaining provisions are borrowed from the Uniform Code.

¹⁶⁹ Section 737.111, F.S. applies to trusts created by Florida residents, and perhaps trusts created in Florida by nonresidents. Certain trusts involved with deferred compensation arrangements are explicitly excluded from the requirements of s. 737.111, F.S. See s. 737.111(5), F.S. An identical exclusion is included in section 736.0402(3), F.S.

¹⁷⁰ See s. 737.111(1), F.S. This section does not apply to trusts created before October 1, 1995. Section 737.111(6), F.S.

¹⁷¹ A trust is revocable if it is revocable by the settlor without the consent of either the trustee or a person holding an adverse interest. Section 736.0103(15), F.S. The decision to restrict s. 736.0403(2), F.S. to revocable trust follows from the Committee's belief that compliance with testamentary formalities is justifiable as a matter of principle only for that class of trusts that operate as will substitutes. Revocable trusts serve that purpose, irrevocable trusts do not. Stated differently, irrevocable outright transfers need not comply with testamentary formalities and the Committee could find no convincing justification for treating irrevocable transfers in trust any differently.

¹⁷² The change from "resident" in s. 737.111, F.S. to "domiciliary" in s. 736.0403(2), F.S. has no substantive effect as the two terms are defined to be synonymous in s. 731.201(11), F.S.

¹⁷³ Section 737.111, F.S. continues to apply to trust created before that date. Section 736.0402(4), F.S.

¹⁷⁴ Unlike s. 737.111, F.S., s. 736.0403(2), F.S. makes no mention of trust amendments. Nevertheless, it applies to trust amendments because trust amendments are included within the definition of trust instrument. See s. 736.0103(20), F.S.

¹⁷⁵ See s. 736.0403(2), F.S., final sentence.

¹⁷⁶ Compare s. 737.111(2), F.S. which seems to imply that trusts executed by nonresidents are subject to the section if the settlor executes the trust in Florida.

¹⁷⁷ Because of the differences between s. 737.111, F.S. and new section 736.0403(2)(b), F.S., the latter applies only to trusts created on or after the effective date of the Code. Section 736.0403(4), F.S. Section 737.111, F.S. continues to apply to trusts created before that date.

Incorporation of Existing Florida Statutes

Chapter 737, F.S. includes two important sections dealing with the modification and termination of irrevocable trusts. With some restructuring, these sections have been incorporated into three sections of the Code. Each is discussed individually below. First, however, consideration is given to features the three sections have in common.

Common Features

The three sections under consideration here – ss. 736.1113, 736.1115 and 736.0412, F.S. – are all in addition to and not in derogation of common law rights to modify, amend, terminate trusts.¹⁷⁸ Although they apply in different contexts and with different prerequisites, none is applicable while a trust is revocable and all permit the same kind of modifications. That is, when applicable, each section provides a mechanism through which a trust can be:

- Amended with respect to either administrative or distribution terms;
- Terminated in whole or in part;
- Modified to direct or permit a trustee to do unauthorized or prohibited acts; or
- Modified to preclude a trustee from doing authorized or required acts.¹⁷⁹

Of course, the three sections have differences as well. By way of preview, areas of difference include:

- The role (if any) a court plays in the modification/termination decision;
- Who may request or effectuate a modification/termination; and
- The respect that is to be given to the settlor's intent.¹⁸⁰

Judicial Modification Consistent with Settlor's Intent

Section 736.04113, F.S. permits a court to modify an irrevocable trust in any of the ways described above if the trust's purposes have been fulfilled or have become illegal, impossible, wasteful or impractical. It also permits modification when, because of an unanticipated change in circumstances, compliance with the original terms would defeat or substantially impair a material purpose of the trust.¹⁸¹ Section 736.04113, F.S. is identical in effect to s. 737.4031(1), F.S. The only real difference is that s. 736.04113, F.S. clarifies who may apply for modification under the section. The application may be made by a trustee or any qualified beneficiary.¹⁸²

An important characteristic of s. 736.04113, F.S. is that as long as they remain legal, possible and consistent with public policy (e.g., not wasteful or impractical), the settlor's purposes for the trust are

¹⁷⁸ See ss. 736.04113(4), 736.04115(5) and 736.0412(6), F.S.

¹⁷⁹ See ss. 736.04113(2), 736.04115(1), and 736.0412(1), F.S.

¹⁸⁰ The Committee expressed the following comment concerning the settlor's intent. It may come as a surprise to some that two of the Code sections may be used to modify or terminate a trust in a manner that is inconsistent with the intent of the settlor. It is worth emphasizing, however, that this possibility is not new with the Code. It exists under the modification provisions in Chapter 737, F.S. as well. The Code's organization and restructuring of these sections just makes this possibility more apparent. Then too, it is also worth noting that, with some tradeoffs, a settlor can preclude modifications and terminations that are inconsistent with his or her intent in the governing instrument. This ability, which involves an interplay between the modification sections and the Rule against Perpetuities, is detailed more fully later.

¹⁸¹ See s. 736.04113(1), F.S.

¹⁸² Section 736.04113(1), F.S.

the guiding polestar in a court's decision to permit a modification. In that regard, in exercising its discretion, the court is directed to consider the terms and purposes of the trust, the facts and circumstances surrounding its creation and other extrinsic evidence relevant to the proposed modification.¹⁸³ Importantly, modification under s. 736.04113, F.S. is not precluded by the presence of a spendthrift provision.¹⁸⁴

The court's authority to modify a trust under s. 736.04113, F.S. is included on the list of mandatory provisions.¹⁸⁵ Thus, while a modification that is inconsistent with a material purpose of the settlor should be rejected by a court, a provision in a trust instrument which would seek to prevent the court from exercising its discretion on the matter is ineffective.

Judicial Modification in the Best Interest of the Beneficiaries

Under Code s. 736.04115, F.S., a court may modify an irrevocable trust in any of the ways described previously when compliance with the terms of the trust is not in the best interest of the beneficiaries.¹⁸⁶ As with s. 736.04113, F.S. discussed above, modification under s. 736.04115, F.S. is not precluded by the presence of a spendthrift provision¹⁸⁷ and, in exercising its discretion, a court is directed to consider the terms and purposes of the trust, the facts and circumstances surrounding its creation, and extrinsic evidence relevant to the proposed modification.¹⁸⁸

Nonjudicial Modification of Irrevocable Trusts

Section 736.0412, F.S. provides for the nonjudicial modification of a trust. Under it, a qualifying trust may be modified in any of the ways described previously upon the unanimous agreement of the trustee and all qualified beneficiaries,¹⁸⁹ although neither a spendthrift clause nor a provision in a trust instrument prohibiting amendment or revocation of a trust prevents modifications under the section.¹⁹⁰ The objection of a nonconsenting beneficiary, however, might.

Protection of Nonconsenting Beneficiaries

Because consent to a nonjudicial modification is required only of the trustee and qualified beneficiaries, there is a possibility that a s. 736.0412, F.S. modification could be detrimental to the interests of other beneficiaries. To protect against that, Code s. 736.0410(2), F.S. allows any beneficiary to commence a judicial proceeding to have a court review a proposed nonjudicial modification.

¹⁸³ Section 736.04113(3)(a), F.S.

¹⁸⁴ Section 736.04113(3)(b), F.S.

¹⁸⁵ See s. 736.0105(2)(j), F.S.

¹⁸⁶ The Committee explained the following regarding modification. Except for a clarification of who may apply for a modification under the section – a trustee or any qualified beneficiary – this section is identical in effect to existing s. 737.4031(2), F.S.¹⁸⁶ Under both, it is the best interest of the beneficiaries that is the controlling criteria for modification. Consequently, it is possible that s. 736.04115, F.S. could be used to modify a trust in a manner that is inconsistent with the settlor's intent. Predictably, this possibility may be anathema to some settlors. If so, read on. By default, under Florida's statutory Rule Against Perpetuities, all trust interests must vest or terminate within 360 years of their creation. For trusts subject to this version of the Rule, section 736.04115 is mandatory. See s. 736.0105(2)(j), F.S. But a provision in a trust instrument that expressly prohibits judicial modification under s. 736.04115, F.S. can be effective if the trust is drafted to comply with either the common law Rule Against Perpetuities (lives in being plus 21 years) or with Florida's shorter 90 year statutory substitute. Note, however, that drafting to comply with the common law or shorter statutory Rules is not in and of itself sufficient to preclude modifications under s. 736.04115, F.S. The trust instrument must also expressly prohibit judicial modifications under the section. See s. 736.04112(3)(b), F.S. Accord, s. 737.4031(2)(c)2, F.S.

¹⁸⁷ Section 736.04115(2)(c), F.S.

¹⁸⁸ Section 736.04115(2)(b), F.S.

¹⁸⁹ Section 736.0412(1), F.S.

¹⁹⁰ Section 736.0412(2), F.S.

Qualification Criteria

Section 736.0412, F.S. is substantively identical to s. 737.4032, F.S. on which it was based. Under both, a number of factors must be considered in determining whether a trust qualifies for nonjudicial modification.

- First, the trust must have been created after 2000.¹⁹¹
- Second, nonjudicial modification is not permitted for any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until such time, if ever, that all charitable interests in the trust have terminated.¹⁹²
- Finally, there can be no nonjudicial modification of any trust while the trust settlor is still alive.¹⁹³ This limitation, insures that a settlor's participation in a modification, either directly as a qualified beneficiary or indirectly as a representative of another qualified beneficiary, cannot cause adverse estate tax exposure at a settlor's death under the expansive reading some recent case decisions have given to IRC sections 2036 and 2038.¹⁹⁴

Other Modification and Termination Provisions

The three sections discussed above have their roots in the existing modification provisions of Chapter 737, F.S. In addition, the Code includes two other modification/termination provisions that are derived from the Uniform Code.

Modification or Termination of Uneconomic Trusts

Code s. 736.0414, F.S. provides a mechanism for a trustee or court to modify or terminate an uneconomic trust. The section is not mandatory; modifications and terminations under the section 736.0414 may be precluded by an express provision in the trust instrument.¹⁹⁵ Assuming no such provision:

- A trustee of a trust with property worth less than \$50,000 may terminate the trust on its own initiative if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.¹⁹⁶ Before proceeding, notice must be given to the qualified beneficiaries.¹⁹⁷ If one or more of them object, they may commence a judicial proceeding to disapprove the trustee's termination.¹⁹⁸

¹⁹¹ Section 736.0412(4)(a), F.S.

¹⁹² Section 736.0412(4)(b), F.S. This restriction is intended to preserve deductibility of charitable trusts for federal tax purposes.

¹⁹³ See s. 736.0412(1), F.S.

¹⁹⁴ Assuming the above criteria are met, a final consideration involves the applicable Rule Against Perpetuities associated with the trust. Section 736.0412, F.S. involves a tradeoff with the Rule Against Perpetuities similar to that detailed above for s. 736.04113, F.S. That is, nonjudicial modification is not only permissible, its availability is mandatory for trusts having a perpetuities period in excess of the common law and 90-year statutory periods.¹⁹⁴ For other trusts, the availability of nonjudicial modification is within the control of the governing instrument. By default, trusts which are drafted to comply with the common law or 90 year statutory periods are automatically exempt from modification under s. 736.0412, F.S. The governing instrument, may however, provide to the contrary. See s. 736.0412(4)(b), F.S.

¹⁹⁵ Although the existence of a spendthrift clause is not itself sufficient to preclude applicability of the section. Section 736.0414(4), F.S.

¹⁹⁶ Section 736.0414(1), F.S.

¹⁹⁷ *Id.*

¹⁹⁸ See s. 736.0414(3), F.S.

- In addition, upon application of a trustee or any qualified beneficiary a court may modify or terminate a trust, or remove or appoint a different trustee, if the court determines that the value of the trust property is insufficient to justify the cost of administration.¹⁹⁹

In either case, upon termination of a trust, the trustee is directed to distribute the trust property in a manner consistent with the purposes of the trust.²⁰⁰

Modification to Achieve Settlor's Tax Objectives

In another section derived from the Uniform Code, s. 736.0416, F.S. provides that upon application by any interested person a court may modify a trust to achieve a settlor's tax objectives. Modifications under the section must be consistent with the settlor's probable intent.²⁰¹

Trust Reformation

The Code contains two sections permitting the reformation of a trust to better effectuate a settlor's intent. The first of these is a codification of the common law *cy pres* doctrine. The second permits reformations to cure mistakes. This latter, in particular, is an expansion of existing law.

Cy Pres

Section 736.0413, F.S. codifies the common law *cy pres* doctrine. Under the section, a court may modify or terminate a charitable trust in a manner consistent with a settlor's charitable purposes if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful. Reformation under s. 736.0413, F.S. is discretionary with a court. In that regard, the section differs from the corresponding Uniform Code provision. Under Uniform Code s. 413, it is presumed that the settlor had a general charitable intent in creating the trust which precludes a court from reverting the trust property back to the settlor or the settlor's successors in interest.²⁰² This limitation is not present in s. 736.0413, F.S.

Reformation to Correct Mistakes

Under s. 736.0415, F.S., upon application of the trustee or any interested person, a court may reform the terms of a trust to conform to the settlor's intentions if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake. Reformation under the section is available for both mistakes of law and of fact, whether or not the terms of the trust are ambiguous.²⁰³

Trust Division and Combination

The final section of Part IV of the Code -- s. 736.0417, F.S. -- gives trustees the power to sever or combine trusts. The section is derived from Uniform Code s. 417. It replaces provisions in Chapter 737, F.S. which also permit trust combinations and severances.²⁰⁴ The Committee preferred the

¹⁹⁹ Section 736.0414(2), F.S.

²⁰⁰ A trustee may enter into agreements and take other necessary or appropriate actions to protect the interests of the beneficiaries and to effectuate the intent and purposes of the trust. Section 736.0414(3), F.S.

²⁰¹ Code s. 736.0416, F.S. provides an important state law authority for this type of modification. It does not, and can not, however, insure that the modification will be recognized for tax purposes. In general, tax recognition requires either that the modification occur before the event giving rise to the tax or that the modification be authorized by the Internal Revenue Code or Treasury Regulations promulgated thereunder. See Rev. Rul. 73-142, 1973-1 C.B. 405.

²⁰² This aspect of the Uniform Code is discussed further in the comments to UTC s. 413.

²⁰³ Existing Florida case law supports reformation to cure scrivener's errors. See *Robinson v. Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998). Section 736.0415, F.S. is broader, however, as it allows reformation for mistakes both in the expression and in the inducement.

²⁰⁴ See s. 737.403, F.S.

Uniform Code provision over existing law because the existing statutes are unnecessarily restrictive. For example, severances under existing statutes must result in trusts with identical terms and with an aggregate of interests that are reasonably equivalent to those that existed prior to the severance. Similar restrictions apply to combinations.²⁰⁵

By contrast, under s. 736.0417, F.S. a trustee may combine trusts even though their terms are not identical. And a single trust can be severed even though the resulting trusts are dissimilar. Three cautions, are in order, however.

- First, the authority of the trustee is circumscribed by a requirement that the severance or combination not impair any beneficiary's rights.
- Second, notice must be given to qualified beneficiaries and any beneficiary may commence a proceeding to disapprove a proposed severance or combination.²⁰⁶
- Lastly, the types of actions permitted under s. 736.0417, F.S. may exceed what are permissible from a tax standpoint. Trustees should exercise caution as tax law requirements for trust combinations and severances vary with the context.

CREDITORS CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS (PART V)

Part V of the Code contains the several provisions that bear on the rights of creditors vis-à-vis a beneficiary's interest in a trust. Areas covered include the ability to garnish present or future distributions; the validity, requisites, effect, and limits of spendthrift provisions; the impact on creditor's rights of discretionary distribution standards; the treatment of self-settled trusts; and the duty of trustees of revocable trusts to pay the expenses and obligations of a settlor's estate.

Third Party Trusts

The term "third party trusts" is used in this Summary as a convenience to distinguish between those trusts that a settlor creates for others and those where the settlor has either a power of revocation or an interest as beneficiary. The latter are referred to as self-settled trusts.

No Spendthrift Provision

With respect to third party trusts, s. 736.0501, F.S. provides the basic statement of creditor remedy. Under the section, as long as the trust does not contain a valid spendthrift provision, a court may "authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means."²⁰⁷ Importantly, the rights given to creditors under the section are limited to those cases where a beneficiary has a right to distributions. If distributions are discretionary, a beneficiary has no "attachable" trust interest. Thus, s. 736.0504(1), F.S. provides that a creditor of a beneficiary may not compel a distribution that is subject to a trustee's discretion whether or not the discretion is subject to a standard and whether or

²⁰⁵ See s. 737.403(b), F.S.

²⁰⁶ Section 736.0410(2), F.S.

²⁰⁷ Although Chapter 737, F.S. contains nothing similar, s. 736.0501, F.S. is consistent with existing Florida case law which permits garnishment of "disbursements that are due to be made or actually made from the trust." *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985). It does not matter that the distribution is to be made to or for the benefit of the beneficiary. See *Bradshaw v. Am. Advent Christian Home and Orphanage*, 145 Fla. 270, 199 So. 329 (1941) ("Where trust income is to be applied for the use and benefit of the *cestui que* trust, a court of equity may direct application of the income to payment of his debts.")

not the trustee has abused the discretion.²⁰⁸ In addition, s. 736.0504(2), F.S. insures that the same rules apply even if the beneficiary is the trustee, provided the trustee's discretion to distribute for its own benefit is limited by an ascertainable standard.²⁰⁹

Section 736.0504, F.S. applies only with respect to the rights of creditors to compel distributions from discretionary trusts. It does not limit the right of a beneficiary to sue for an abuse of discretion or a failure to comply with a distribution standard.²¹⁰

Spendthrift Trusts

Code s. 736.0502, F.S. gives statutory recognition to spendthrift provisions.²¹¹ Assuming a trust has a valid spendthrift provision:

- A beneficiary may not transfer his beneficial interest in the trust; and

²⁰⁸ Existing Florida case law does not permit the garnishment of interests in wholly discretionary trust interests. See *Bacardi v. White*, supra note 207. Whether the same rule applies to trusts where the discretion is subject to a standard, particularly where the standard has been abused, is not clear.

²⁰⁹ On the question of when a trustee's powers may be subject to an ascertainable standard even though such a standard is not provided in the trust instrument, see ss. 736.0814(2) and (3), F.S. under which a power of a trustee other than a settlor or a spouse of a settlor to distribute to itself is automatically restricted by an ascertainable standard. Section 736.0504(2), F.S. is derived from UTC section 504(e). The purpose of the provision is explained in the following comment to the UTC section:

The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts s.60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The Committee notes that there is no Florida case law in support of the position taken by the Restatement (Third) of Trusts above with respect to powers subject to ascertainable standards. In *Croom v. Ocala Plumbing & Electric Co.*, 62 Fla. 460 (1911), the supreme court did subject property to the reach of trust beneficiaries' creditors because the trust instrument gave the beneficiaries an unrestricted right to demand distribution of the trust. The court said:

Even if a deed creating a spendthrift trust, if properly construed, is valid and effectual to exempt the property from the debts of the beneficiaries, yet where the deed provides that the trustees shall convey all or any part of the property to the *cestui que* trust or to their assigns as they may direct on the joint request in writing, this virtually gives them absolute dominion so as to vest in them or their assigns absolute title, and such deed does not exempt the property from their debts under the general rule that when one has an interest in property which he may alien or assign, that interest, whether legal or equitable, is liable for the payment of his debts.

The powers in *Croom*, however, were unrestricted. The rationale of the case would not appear to apply to powers subject to an ascertainable standard. Hence, the Committee believes that section 736.0504(2) is consistent with existing law.

²¹⁰ Section 736.0504(3), F.S.

²¹¹ The Code clarifies that no special language is necessary to create a spendthrift trust. Thus, a trust term to the effect that beneficial interests are subject to a spendthrift trust or words of similar import is sufficient to do the trick. See s. 736.0502(2), F.S.

- With some exceptions discussed next, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before it is received by the beneficiary.²¹²

Spendthrift provisions are also recognized in existing Florida case law, although there is an important difference in the treatment of them under the Code. The difference concerns the required scope of the restraint on alienability. Under Florida case law, it appears possible for a spendthrift provision to allow limited transfers among family members.²¹³ That is not allowable under the Code. Under s. 736.0502(1), F.S., a spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest. Because this limitation is mandatory and is a change in existing law, the requirement does not apply to any trust in existence on the effective date of the Code.²¹⁴

Exception Creditors

When it comes to the effectiveness of spendthrift provisions, not all creditors are created equal. For public policy reasons, some creditors may proceed against a beneficiary's interest in a trust even though the trust includes a spendthrift clause. Thus, s. 736.0503(2), F.S. provides that a spendthrift clause is unenforceable against:

- A claim by a beneficiary's child, spouse, or former spouse for support or maintenance;
- A judgment creditor (such as an attorney) who has provided services for the protection of a beneficiary's interest in the trust; or
- A claim by a state or the United States, but only to the extent a separate statute so provides.

Remedies Available to Exception Creditors

The fact that spendthrift clauses are unenforceable against exception creditors means only that these creditors have remedies against a beneficiary's interest similar to those of creditors of beneficiaries with interests in a trust that does not include a spendthrift provision. That is, exception creditors may attach present or future distributions to or for the benefit of the beneficiary;²¹⁵ they cannot compel distributions from or otherwise reach beneficial interests in discretionary trusts.²¹⁶

Key Change from Existing Law

The concept of exception creditors has been recognized in Florida's case law since the 1985 decision in *Bacardi v. White*²¹⁷ in which the Supreme Court permitted a former spouse to recover alimony and attorney's fees from her former husband's spendthrift trust. In dicta, the court indicated that the result would be the same for a claim by a child for child support. A key difference between the *Bacardi* holding and the Code treatment of these exception creditors, however, is that the court in *Bacardi* held that the spouse's remedy is a last resort remedy which is available only upon a showing that traditional remedies are not effective.²¹⁸ The Code's provisions dealing with exception creditors are not so limited. Hence the Code changes existing law in this area by eliminating the need to show that traditional remedies are ineffective.

²¹² Section 736.0502(3).

²¹³ Although neither court discussed the point, the spendthrift clauses upheld in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985) and *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001) both permitted limited transfers to family members.

²¹⁴ Section 736.0502(1), F.S.

²¹⁵ See s. 736.0503(3), F.S. This subsection also preserves the existing procedures available under the Uniform Interstate Family Support Act. See Chapter 88, F.S.

²¹⁶ See s. 736.0504(1), F.S., discussed supra, p. 24, which applies whether or not a trust contains a spendthrift provision.

²¹⁷ 463 So. 2d 218 (Fla. 1985).

²¹⁸ Accord, *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001).

Mandatory Distributions

Although a spendthrift provision prevents a beneficiary's creditor from attaching or garnishing the beneficiary's interest in a trust, it does not protect trust income or principal after it has been distributed to the beneficiary. For that reason, a sympathetic trustee might be tempted to delay required distributions to spendthrift beneficiaries to frustrate or delay the beneficiaries' creditors' efforts to reach the distributions. Code s. 736.0506, F.S. is intended to prevent this. Under the section, whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution that the trustee does not make within a reasonable time.²¹⁹ For this purpose, a mandatory distribution is a distribution of income or principal that the trustee is required to make under the terms of the trust, including a distribution on termination of the trust. The term does not encompass discretionary distributions of any sort.²²⁰

Self-settled Trusts

As mentioned previously, this Summary uses the term "self-settled trust" as a convenience. A trust is a self-settled trust if it is revocable by the settlor or if the settlor is a mandatory or permissible distributee of trust property.

Creditor Remedies

Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. This follows from a widely accepted public policy maxim that you should not be permitted to put property in a trust for your own benefit and escape your creditors. This policy maxim informs the Code's treatment of self-settled trusts. Under Code s. 736.0505(1), F.S., whether or not a trust includes a spendthrift provision:

- While a trust is revocable, the trust property is subject to the claims of the settlor's creditors;²²¹ and
- In the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum that can be distributed to or for the benefit of the settlor.^{222 223}

Withdrawal Powers

While the remedies given in the Code to creditors of settlors of self-settled trusts are not new, there is one aspect of s. 736.0505, F.S. that may be. Under s. 736.0505(2)(a), F.S., during the period it may be exercised, a holder of a withdrawal power over trust property is treated the same as a settlor of a revocable trust with respect to the property subject to the power.²²⁴ Hence, the power holder's creditors may reach the property subject to the power.

²¹⁹ Section 736.0506(2), F.S.

²²⁰ It is immaterial for this purpose that the discretion is subject to a standard or that it is coupled with language of direction. Section 736.0506(1), F.S.

²²¹ Section 736.0505(1)(a), F.S. Accord UTC s. 505(a)(1); Restatement (Third) of Trusts s. 25 comment e (Tentative Draft No. 1, approved 1996). But see Restatement (Second) of Trusts s. 330 comment o (1959) indicating that the rule with respect to revocable trusts at common law is different.

²²² Section 736.0505(1)(b), F.S. Accord UTC s. 505(a)(2); Restatement (Third) of Trusts s. 58(2) and comment e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 156 (1959).

²²³ Neither of these rules is surprising. As both are consistent with accepted general principles of law, the Committee believed that s. 736.0505(1), F.S. does not change existing Florida law. Of course, not all states follow these rules. Recent, legislation in some states gives greater creditor protection to irrevocable self-settled trusts.

²²⁴ Section 736.0505(2)(a), F.S.

As the term “power of withdrawal” does not include powers held by a trustee which are limited by an ascertainable standard or powers which require the consent of the trustee or an adverse person,²²⁵ the rule in section 736.0505(2)(a), F.S. appears consistent with the Supreme Court's decision in *Croom v. Ocala Plumbing & Electric Co.*²²⁶ which subjected trust property to the reach of creditors when the trust beneficiaries had an unrestricted right to access trust property. Under s. 736.0505(2)(b), F.S., however, upon a lapse, release, or waiver of a withdrawal power, the power holder retains the status of trust settlor with respect to the value of the property subject to the lapse, etc.²²⁷ Accordingly, the power holder's creditors can reach the maximum amount of that property that could thereafter be distributed to the power holder. As there is no similar principal in existing Florida case law, the Committee views s. 736.0505(2)(b), F.S. to be a change in existing law.²²⁸

Trustee's Duty to Pay Expenses and Obligations of Settlor's Estate

Chapter 737, F.S. includes provisions which establish a workable and important mechanism by which the assets of a deceased settlor's revocable trust must be applied in payment of the expenses of administration and the obligations of a settlor's estate. The Code incorporates these provisions without change. Thus, in a mandatory provision, s. 736.05053, F.S. obligates a trustee of a trust described in s. 733.707(3), F.S.²²⁹ to pay to a deceased settlor's personal representative amounts the personal representative certifies in writing to be required to pay administration expenses and the obligations of the settlor's estate. The section is identical to s. 737.3054, F.S. In another mandatory provision, Code s. 736.05055, F.S. carries forward the requirements found in s. 737.308, F.S., including the requirement imposed on a trustee of a trust described in s. 733.707(3), F.S. to file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate.

Revocable Trusts (Part VI)

Part VI of the Code gathers in one place most of the provisions relating to revocable trusts, which the Code defines to be a trust that may be revoked by the settlor without the consent of either a trustee or a person having an adverse interest.²³⁰ In an initial mandatory provision, s. 736.0601, F.S. clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will.²³¹ Other sections specify the rules to be used to determine if and how a trust may be revoked or amended, the

²²⁵ See s. 736.0103(12), F.S.

²²⁶ 62 Fla. 460 (1911). *Croom* is discussed further at note 209.

²²⁷ See s. 736.0505(2)(b), F.S.

²²⁸ The Code contains an important qualification to the rule discussed above dealing with the effect of lapses, releases and waivers. The rule applies if and only to the extent the value affected by the lapse, release or waiver exceeds the greater of the gift tax annual exclusion (currently \$11,000) or the safe harbor for lapses under the federal gift and estate tax laws (currently the greater of \$5,000 or 5 percent of the trust). See ss. 736.0505(b)(1) and (2), F.S. For powers drafted not to exceed these limits, the property subject to the power will be subject to the power holder's creditors before the lapse, release, etc., but not thereafter. Initially, the Committee favored a rule that would have excepted lapsing powers altogether (even while they were exercisable) provided the powers lapsed within the restrictions of the gift tax annual exclusion or transfer tax safe harbors. Such an exception, however, would invite abuse as unrestricted and unlimited withdrawal powers could be brought within the scope of the exception simply by providing that they are to lapse at some nominal rate (such as \$100 per year). Ultimately, the Committee accepted the treatment described in the text which is also the treatment given to withdrawal powers under the Uniform Code. See UTC s. 505(b).

²²⁹ Sections 736.05053 and 736.05055, F.S. refer to trusts described in s. 733.707(3), F.S. rather than to revocable trusts because s. 733.707(3), F.S. is a broader concept. In addition, the section contains safeguards to prevent adverse tax consequences.

²³⁰ Section 736.0103(15), F.S.

²³¹ As a section dealing with the requirements for creating a trust, s. 736.0601, F.S. is made mandatory by s. 736.0105(2)(a), F.S.

effect revocability has on the duties and liabilities of a trustee and the limitations period for contesting revocable trusts after the death of the settlor.²³²

Consequences of Revocability

Revocability is important under the Code in two respects. The first, discussed previously, is the impact revocability has on the ability of a settlor's creditors to reach trust assets in satisfaction of their claims and the liability the trust has for contribution for costs and claims at a settlor's death. The second area where revocability plays an important role concerns the duties of the trustee. While a trust is revocable, the trustee's duties are owed exclusively to the trust settlor.²³³ As a consequence:

- No other person is entitled to notices, information, accountings, or reports;²³⁴ and
- A trustee may follow a direction of the settlor that is contrary to the trust instrument.²³⁵

The situations where a trustee's duties are restricted by section 736.0603 are not limited to traditional revocable trusts. Under s. 736.0603(2), F.S., during the period the power may be exercised, a holder of a power of withdrawal is given the rights of a settlor of a revocable trust with respect to the property subject to the power.²³⁶ Hence, if upon attaining a specified age, a beneficiary is given a continuing right to withdraw all trust property, the trustee has no duty to send notices, information, accountings, or reports to any other beneficiary.²³⁷

Trusts are Revocable by Default

In an important change from prior law, the Code provides that trusts are revocable by default. That is, unless the trust instrument states that the trust is irrevocable, the trust may be amended or revoked by the settlor.²³⁸

This change is prospective only. It conforms Florida law to that of California, Texas and a growing number of other states, including those that have adopted the Uniform Code. The new rule reflects the view that most well drafted trust instruments explicitly say whether they are revocable. When a trust instrument does not clarify this, the implication is that the instrument was not drafted by an experienced attorney in which case the trust was probably intended to be revocable.²³⁹

²³² As for the capacity to execute a revocable trust, all of the Committee agreed that it should be the same as that required to execute a will. But some on the Committee preferred that the standard for both be raised to that required to make an irrevocable inter vivos gift.

²³³ Section 736.0603(1), F.S.

²³⁴ The corresponding provision of the Uniform Code ceases to apply if a settlor loses capacity. See UTC s. 603(a). This restriction is not present in s. 736.0603(1), F.S.

²³⁵ See s. 736.0808(1), F.S. discussed *infra* at p. 43.

²³⁶ Accord UTC s. 603(b).

²³⁷ Section 736.0603(2), F.S. is not restricted to withdrawal powers that extend to the entire trust. It applies in the case of powers to withdraw only a portion of a trust, including lapsing powers so commonly included for tax purposes. With respect to these powers, however, the impact of s. 736.0602(2), F.S. should be minor, first because its applicability would be limited to the portion of the trust that is subject to the withdrawal power, and second because the section ceases to apply once the power lapses.

²³⁸ Section 736.0602(1), F.S. Under the Code, if a trust is revocable, it may also be amended. See generally the comments to UTC s. 601 citing Restatement (Third) of Trusts s. 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second of Trusts s. 331 cmt. g & h (1959) to the same effect. See also s. 736.0602(1), F.S.

²³⁹ See generally the comments to UTC s. 602(a). Moreover, if the assumptions underlying the revocable by default rule are wrong in a particular case, it is easier to make a revocable trust irrevocable than it would be to reform an irrevocable trust into a revocable one.

Revocation Methodology

In addition to stating that it is revocable, a well drafted revocable trust instrument will specify the method that is to be used to accomplish a revocation or amendment. Under the Code:

- If the instrument does this, the provision in the instrument is exclusive in the sense that the trust can be revoked or amended only by substantially complying with the method stated in the instrument.²⁴⁰
- If the instrument does not specify a method, any clear and convincing manifestation of the settlor's intent to revoke is sufficient,²⁴¹ including a provision in the settlor's later will or codicil expressly revoking the trust or specifically devising property that would otherwise pass according to the trust terms.²⁴²

Both principles, however, are subject to the possible overriding application of s. 736.0403(2)(b), F.S. as well as to certain other restrictions when someone is acting on behalf of the settlor or when a trust has more than one settlor.

Interrelationship with s. 736.0403(2)(b), F.S.

Recall that under s. 736.0403(2)(b), F.S., the testamentary aspects of a revocable trust executed by a Florida domiciliary are void unless the trust instrument is executed in the manner required for wills. Under the Code, the term trust instrument includes trust amendments.²⁴³ Hence, notwithstanding the principles set out above, *amendments* to the testamentary provisions of a revocable trust must comply with s. 736.0403(2)(b), F.S.

The question of whether trust *revocations* must also comply with s. 736.0403(2)(b), F.S. is less clear. The better position is that they do not, as the effect of a revocation is to return the property to the settlor free of trust.²⁴⁴ It is an unnecessary stretch to say that such a result is a trust "amendment" to which s. 736.0403(2)(b), F.S. would apply. Nevertheless, there is sufficient uncertainty on the issue that compliance with s. 736.0403(2)(b), F.S. for all amendments and revocations would appear prudent.

Revocations on Behalf of a Settlor

In most cases, a settlor's power of revocation or amendment will be exercised personally. The Code does, however, confirm separate Florida statutes under which others have a limited authority to act on a settlor's behalf. Thus, a settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by:

- An attorney in fact, but only as authorized by s. 709.08, F.S.,²⁴⁵ or
- A guardian of the property, but only as authorized in s. 744.441, F.S.²⁴⁶

²⁴⁰ Section 736.0602(3)(a), F.S. The "substantial compliance" test in this section may be more lenient than existing Florida law which appears to require strict compliance. See *Euart v. Yoakley*, 456 So.2d 1327 (Fla. 4th DCA 1984).

²⁴¹ Section 736.0602(3)(b)2, F.S. Accord *Macfarlane v. First National Bank of Miami*, 203 So. 257 (Fla. 3d DCA 1967).

²⁴² Section 736.0602(3)(b)1, F.S.

²⁴³ Section 736.0103(20), F.S.

²⁴⁴ Under this view, if no methodology is expressed in the trust instrument, a trust could be revoked by physical act or perhaps even by an oral statement. For a suggestion that both approached might be available under the identical provision of the Uniform Code, see the comments to UTC s. 602.

²⁴⁵ Section 736.0602(5), F.S.

²⁴⁶ Section 736.0602(6), F.S.

Trusts with more than one Settlor

As defined in the Code, "settlor" includes anyone who transfers property to a new or existing trust.²⁴⁷ Under this definition, a trust can have more than one settlor. In such cases, s. 736.0602(2), F.S. specifies default rules for how the trust may be revoked or amended. As a general principle, each settlor may unilaterally revoke or amend his or her trust portion. But an exception applies if a trust consists of community property. To that extent, either spouse may revoke the trust, but amendments require the joinder of both. In all cases, if a trust is revoked or amended by fewer than all settlors, the trustee must promptly notify the other settlors of that fact.²⁴⁸

Protection of Trustees

If a trust is revoked, the Code directs the trustee to deliver the trust property as the settlor directs.²⁴⁹ Of course, nothing insures that directions from the settlor will be forthcoming and, particularly where no method is specified in the trust instrument, it is possible that a trust could be amended or revoked without the trustee's knowledge. In such cases, the Code holds the unknowing trustee harmless for distributions made and other actions taken on the assumption that the trust has not been amended or revoked.²⁵⁰

Trust Contests

Provisions relevant to trust contests appear in several places in the Code. Reference has already been made to the fact that a trust or part of a trust is void to the extent its creation is procured by fraud, duress, mistake, or undue influence.²⁵¹ Reference has also been made to the general rule prohibiting actions to contest the validity of trusts while they are revocable and the exception to the prohibition that applies to court sanctioned contests by the guardian of the property of an incompetent settlor.²⁵² Part VI's contribution to this area is s. 736.0604, F.S. This section sets out the period of limitations for contesting a trust that was revocable at the settlor's death. On a person by person basis, a trustee can have the advantage of a short six month limitations period by sending the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address, and the time allowed for commencing a proceeding. As is true across the entire Code, the representation provisions of Part III are available to a trustee who wishes to comply with the requirements of s. 736.0604, F.S.²⁵³

Office of Trustee (Part VII)

Part VII of the Code contains the various rules relating to the office of trustee. This includes provisions detailing when and how a designated trustee accepts or declines the office; how trustees may resign or be removed; the powers and duties of a trustee who has resigned or been removed; and when vacancies in the office of trustee must be filled and how successor trustees are appointed. Also covered are the duties and powers of cotrustees, compensation of trustees, and trustees' right to reimbursement for expenses incurred in the administration of the trust.

²⁴⁷ Section 736.0103(16), F.S.

²⁴⁸ See s. 736.0602(2), F.S. The restrictions placed on trusts holding community property are intended to facilitate the ability to transfer community property to a trust without destroying its community property characteristics. See comments to UTC s. 602.

²⁴⁹ Section 736.0602(4), F.S.

²⁵⁰ Section 736.0602(7), F.S.

²⁵¹ See s. 736.0406, F.S.

²⁵² See s. 736.0207, F.S.

²⁵³ This important new provision attempts to strike a balance between the need for a reasonable period to bring an action contesting the validity of a revocable trust and the sometimes competing interest the trust beneficiaries have in an expeditious resolution of their rights and a distribution of their shares.

Accepting or Declining the Office

A person designated in a trust instrument to serve as trustee may decline to do so. Prior to acceptance, a trustee who knows of his designation of trustee is deemed to decline the trusteeship if the person does not accept the designation within a reasonable time.²⁵⁴ A person accepts the trusteeship by substantially complying with the method provided in the terms of the trust or by otherwise indicating acceptance, such as by accepting delivery of the trust property or by exercising powers or performing duties as trustee.²⁵⁵

Actions not Constituting Acceptance

In some cases, it is desirable for a person designated as trustee to be able to act on behalf of a trust, or in his or her own interest, without the actions being treated as an acceptance of the trusteeship. To facilitate this, the Code provides that a designated trustee may, without accepting the trusteeship:

- Act to preserve trust property (provided the person sends a notice of the person's decision to decline the trusteeship to at least one qualified beneficiary within a reasonable time of taking the action); or
- Inspect or investigate trust property for any purpose including to determine potential liability under environmental or other law.²⁵⁶

Trustee's Bond

A trustee need not give bond unless required by the terms of the trust or the court finds that a bond is needed to protect the interests of the beneficiaries.²⁵⁷ In the former case, the court may dispense with a bond required in an instrument. And in all cases, it may specify the amount of the bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond or surety at any time.²⁵⁸

Resignations and Removals

Resignations

A trustee may resign with court approval.²⁵⁹ In addition, the Code provides a mechanism for trustees to resign without court approval. A trustee may resign by giving at least 30 days notice to the settlor (if living), the cotrustees (if any) and all qualified beneficiaries.²⁶⁰ In either case, a trustee's resignation does not discharge any liability of the resigning trustee or any sureties on the trustee's bond.²⁶¹

The ability of a trustee to resign without court intervention was new. There was no counterpart under prior law.²⁶² Subsequently, new s. 737.309, F.S. was enacted to permit this. Note that under the Code,

²⁵⁴ Section 736.0701(2), F.S.

²⁵⁵ Section 736.0701(1)(a) and (b), F.S.

²⁵⁶ Section 736.0701(3)(a) and (b), F.S.

²⁵⁷ Section 736.0702(1), F.S.

²⁵⁸ Section 736.0702(2), F.S. The Committee notes that the power a court has to modify or terminate a bond under this subsection includes the power to modify any required surety.

²⁵⁹ Section 736.0705(1)(b), F.S. The court may impose conditions and enter orders reasonable necessary to protect trust property. Section 736.0705(2), F.S.

²⁶⁰ Section 736.0505(1)(a), F.S.

²⁶¹ Section 736.0705(3), F.S.

²⁶² Prior Florida law followed the general rule that a trustee who has accepted a trusteeship cannot resign except in accordance with the terms of the trust, upon consent of all beneficiaries, or with approval of a court of competent jurisdiction. See e.g., *Stearns v. Fraleigh*, 39 Fla. 603, 23 So. 18 (1897); *Strong v. Willis*, 3 Fla. 1244 (1850). See also J. Grimsley, Florida Law of Trusts, s. 4-3; Restatement (Second) of Trusts s. 106(b) (Ali 1957).

however, the trustee's right to resign is a mandatory provision. It may not be denied or curtailed in the trust instrument.²⁶³

Removals

Court removal of a trustee may be sought by the settlor, a cotrustee, or any beneficiary. The Code also recognizes the ability of a court to remove a trustee on its own initiative.²⁶⁴ Statutory grounds for removal include a serious breach of trust, lack of cooperation among cotrustees, and unfitness, unwillingness or persistent failure to effectively administer the trust.²⁶⁵ In lieu of (or in addition to) removing a trustee, the court may grant appropriate relief for any breaches of trust that have occurred.²⁶⁶

The Code's provision giving a settlor the right to seek removal of a trustee is probably an expansion of existing law.²⁶⁷ So too is the "unfitness" criteria at least if and to the extent it permits removal in anticipation of an actual breach.²⁶⁸

The Code also permits removal of a trustee at the request of all of the qualified beneficiaries or upon a showing of a substantial change in circumstances. Removal on these grounds does not require a showing of malfeasance. It requires only that:

- The removal best serve the interests of all beneficiaries;
- It not be inconsistent with a material purpose of the trust; and
- A suitable cotrustee or successor trustee be available.²⁶⁹

Delivery of Property by Former Trustee

Subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes, a removed or resigning trustee must, within a reasonable time, deliver any trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.²⁷⁰ Pending that, unless a cotrustee remains in office or the court orders otherwise, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect trust property.²⁷¹

²⁶³ See s. 736.0105(2)(o), F.S.

²⁶⁴ Section 736.0706(1), F.S.

²⁶⁵ Section 736.0706(2)(a) – (c), F.S.

²⁶⁶ See s. 736.0706(3), F.S. On the remedies generally available for a breach of trust, see s. 736.1001(2), F.S. discussed *infra* at p. 47.

²⁶⁷ See *Sanders v. Citizens Nat. Bank of Leesburg*, 585 So. 2d 1064 (Fla. 5th DCA 1991) holding that the settlor of an irrevocable trust who has retained no beneficial interest in the trust corpus cannot maintain an action to enforce the trust.

²⁶⁸ Under existing law, the general rule is that removal of a trustee must be predicated on a "clear showing of abuse or wrongdoing in the actual administration of the trust" or upon a showing of disharmony and hostility between trustees. Removal may not be predicated solely on hostility between beneficiaries and a trustee or upon a potential for mismanagement or conflict of interest. See *Parr v. Cushing*, 507 So.2d 1227, 1228 (Fla. 5th DCA 1987); *Robinson v. Tootalian*, 691 So. 2d 52 (Fla. 4th DCA 1997); *State of Delaware ex rel. Gebelein v. Belin*, 456 So. 2d 1237 (Fla. 1st DCA 1984), *rev. den.* 464 So.2d 556; *Rosen v. Rosen*, 167 So. 2d 70 (Fla. 3d DCA 1964).

²⁶⁹ Section 736.0706(2)(d), F.S. The necessity of getting the joinder of all qualified beneficiaries may be facilitated by the representation provisions of Part III of the Code. Moreover, it may be possible to use ss. 736.04113 or 736.04115, F.S. to remove a trustee without meeting the requirements of section 736.0706(2)(d), F.S.

²⁷⁰ Section 736.0707(2), F.S. The provisions of this subsection are explicitly stated to be in addition to and not in derogation of the rights of a removed or resigning trustee under common law. The intent of this statement is to insure that the subsection is not read as overruling the holding in *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Assoc. Inc. Et. al.*, 832 So. 2d 948 (Fla. 2d DCA 2002).

²⁷¹ Section 736.0706(3), F.S.

Vacancies and Appointment of Successor Trustees

The court has plenary authority to appoint an additional trustee or special fiduciary whenever the court considers it necessary for the administration of the trust.²⁷² In addition, the court has residual authority to appoint a successor trustee if an otherwise unfilled vacancy in the trusteeship occurs.²⁷³

A vacancy in a trusteeship can occur for a number of reasons including the inability to identify a designated trustee, the fact that a designated trustee declines the office, is adjudicated to be incapacitated, resigns, is disqualified, is removed or dies.²⁷⁴ In each instance, unless the terms of the trust provide otherwise, a vacancy need not be filled unless there is no remaining trustee to serve.²⁷⁵ Where a vacancy in a trusteeship is required to be filled, it must be filled first by a person designated pursuant to the terms of the trust, then by a person appointed by unanimous agreement of the qualified beneficiaries (or in the case of charitable trusts, the charitable organizations expressly designated to receive distributions under the terms of the trust), and lastly, if necessary, by a person appointed by the court.²⁷⁶

Cotrustees

Duty to Participate

With some exceptions noted below, the Code imposes upon cotrustees a duty to participate in the administration of the trust.²⁷⁷ In doing so, it is normally to be expected that the cotrustees would act by unanimous consent. However, if the cotrustees are not able to reach a unanimous decision, they may act by majority agreement.²⁷⁸

Failure to Participate

A cotrustee's participation is excused if the cotrustee is unavailable because of absence, illness, disqualification or other temporary incapacity,²⁷⁹ in which cases the remaining trustee or a majority of the remaining trustees may act for the trust if prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property.²⁸⁰ In addition, a cotrustee's participation in the administration of the trust is not required if the trustee has properly delegated performance of a function to another trustee.²⁸¹

Delegation among Cotrustees

Delegation is permitted under the Code only of those functions the settlor did not reasonably expect the trustees to perform jointly.²⁸² In the absence of an express delegation authority in the trust instrument, this would normally be limited to ministerial duties incidental to the execution of the trust, although even in the absence of a provision in the governing instrument, the investment decisions may be delegated to a qualified trustee under other provisions of the Florida statutes.²⁸³

²⁷² Section 736.0704(5), F.S.

²⁷³ See ss. 736.0704(3)(c) and (4)(c), F.S.

²⁷⁴ These reasons are detailed in s. 736.0704(1), F.S.

²⁷⁵ Section 736.0704(2), F.S. If a vacancy in a cotrusteeship occurs, the remaining trustees (or a majority of the remaining trustees) may act for the trust. Section 736.0703(2), F.S. *Accord* s. 737.404(2), F.S.

²⁷⁶ Section 736.0704(3) and (4), F.S. The ability of qualified beneficiaries (or named charities) to designate a successor trustee is an expansion of existing Florida law. See *Van Roy v. Hunter*, 96 Fla. 194, 117 So. 887 (1928) (a vacancy in a trusteeship would be filled by a court if the instrument did not provide for a successor or a method of selecting a successor).

²⁷⁷ Section 736.0703(3), F.S.

²⁷⁸ Section 736.0703(1), F.S.

²⁷⁹ Section 736.0703(3), F.S.

²⁸⁰ Section 736.0703(4), F.S.

²⁸¹ Section 736.0703(3), F.S.

²⁸² Section 736.0703(5), F.S. Irrevocable delegations are not permitted under this subsection. A trustee may revoke a delegation previously made. Compare UTC s. 703(e).

²⁸³ On this, see s. 518.112, F.S.

Liability of Nonjoining or Dissenting Trustees

In general, a trustee who does not join in an action by another trustee is not liable for the action.²⁸⁴ However, this rule is subject to the overriding duty of each trustee to exercise reasonable care to prevent a cotrustee from committing a breach of trust and to compel a cotrustee to redress a breach that does occur.²⁸⁵

Because the Code permits a majority of trustees to act for the trust, it is possible that one or more trustees could be outvoted as to some particular course of action. A dissenting trustee who joins in an action at the direction of a majority of trustees is not liable for actions taken by the majority provided notice of the dissent is given to any cotrustee at or before the time of the action.²⁸⁶

Compensation and Reimbursement of Trustees

A trustee is entitled to reasonable compensation,²⁸⁷ including reasonable additional compensation for other services the trustee renders in connection with the administration of the trust.²⁸⁸ If the trustee's compensation is specified in the terms of the trust, the trustee is entitled to be compensated as specified, subject to the court's authority to allow more or less compensation if the trustee's duties are substantially different from those originally contemplated or the specified compensation is unreasonably low or high.²⁸⁹

A trustee is also entitled to be reimbursed out of the trust property, with appropriate interest, for reasonable expenses properly incurred in the administration of the trust. A trustee has a lien against trust property to secure reimbursement for advances (plus interest) made by the trustee for the protection of the trust.²⁹⁰

Duties and Powers of Trustee (Part VIII)

As its title suggests, Part VIII of the Code covers the duties and powers of a trustee. Coverage in this section of the analysis begins with duties, moves on to powers, and ends with a few miscellaneous matters.

Duties of a Trustee

In a series of separate sections, the Code codifies all of the fundamental common law duties of a trustee as well as several other more specifically targeted duties relating to the collection,

²⁸⁴ Section 736.0703(6), F.S.

²⁸⁵ Section 736.0703(7)(a) and (b), F.S. The corresponding provision in the Uniform Code refers to "serious" breaches of trust. See UTC s. 703. The Committee removed "serious" because it did not feel the word clarified the meaning of the section. Mere technical breaches would not appear to be a problem under the subsection as they would not normally result in damages to the trust or its beneficiaries. The "seriousness" of other breaches will be reflected in the standard of reasonable care required by the subsection.

²⁸⁶ Section 736.0703(8), F.S. Unlike the similar provision in existing law, s. 736.0703(8) does not require the notice of the dissent to be in writing. Compare s. 737.404, F.S.

²⁸⁷ Section 736.0708(1), F.S. On the factors to be taken into account in determining a reasonable compensation, see *West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville*, 100 So. 2d 807 (1958) citing with favor Bogert, *Trusts and Trustees*, s 976.

²⁸⁸ Section 736.0708(3), F.S. There is no existing statute covering the compensation of multiple trustees and the Code does not address this issue either. Compare s. 733.716(5), F.S. dealing with the compensation of multiple personal representatives.

²⁸⁹ Section 736.0708(2), F.S. The authority of the Court to adjust a trustee's compensation in this manner under existing law is unsettled.

²⁹⁰ Section 736.0709(1) and (2), F.S. This section accords with existing law on the subject. See s. 737.402(2)(s), F.S. See also, *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000).

management, and distribution of trust property. Except as otherwise noted, all of the Code's provisions dealing with the duties of a trustee are consistent with existing Florida decisional and statutory law. In addition, except as otherwise noted, these provisions are default rules which apply only in the absence of a contrary provision in the trust instrument.

Compendium of Statutory Duties

A comprehensive list of the statutory duties of a trustee is presented here. Included on the list are the duty of loyalty, the duty to redress breaches, and the duty to inform and account each of which is sufficiently nuanced to merit additional discussion. That discussion appears after the list.

Duty to Administer in Good Faith

A trustee has a duty to administer the trust in good faith and in accordance with its terms and the interests of the beneficiaries.²⁹¹ This is a mandatory duty which may not be relaxed or curtailed in the trust instrument.²⁹²

Duty of Loyalty

As between the trustee and the beneficiaries, a trustee has a duty to administer the trust solely in the interests of the beneficiaries. This duty is explored in greater detail in the next section of the analysis.

Duty of Impartiality

When a trust has more than one beneficiary, a trustee must administer the trust impartially giving due regard to the respective interests of the beneficiaries.²⁹³

Duty to Administer Prudently

A trustee must administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust and by exercising reasonable care, skill, and caution.²⁹⁴

Duty to Incur only Reasonable Expenses

A trustee must incur only expenses that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.²⁹⁵

Duty to use Special Skills

A trustee with special skills or expertise has a duty to use those special skills.²⁹⁶

²⁹¹ Section 736.0801, F.S. This section is identical to UTC s. 801. The requirement of good faith imposed by the section is consistent with existing Florida case law. See *Mesler v. Holly*, 318 So. 2d 530 (Fla. 2nd DCA 1975); *Hoppe v. Hoppe*, 370 So. 2d 374 (Fla. 4th DCA 1978).

²⁹² Section 736.0105(2)(b), F.S.

²⁹³ Section 736.0803, F.S.

²⁹⁴ Section 736.0804, F.S. This is a more generalized statement of the duty relating to trust investments that appears in Florida's Prudent Investor Act. See s. 518.11(a), F.S.

²⁹⁵ Section 736.0805, F.S.

²⁹⁶ This duty also extends to a trustee who is named trustee on the basis of the trustee's representation that the trustee possesses special skills or expertise. S. 736.0806, F.S. This duty also appears in the Florida Prudent Investor Act. See s. 518.11(1)(a), F.S.

Duty to Control and Protect Trust Property

A trustee must take reasonable steps to take control of and protect trust property. This includes the taking of reasonable steps to compel a former trustee or other person to deliver trust property to the trustee.²⁹⁷

Duty to Keep Accurate Records

A trustee must keep clear, distinct, and accurate records.²⁹⁸

Duty not to Commingle and to Earmark

A trustee must keep trust property separate from the trustee's own property and must, to the extent feasible, cause the interest of the trust to appear in any records maintained by third parties.²⁹⁹ An exception permits a trustee to invest two or more separate trusts as a common fund if the trustee maintains records clearly indicating the respective interests.³⁰⁰

Duty to Ascertain Marketable Title

A trustee must obtain title insurance or proof of marketable title when it is required for a specific sale or conveyance, but need not do so prior to that time.³⁰¹

Duty to Enforce and Defend Claims

A trustee must take reasonable steps to enforce claims of and to defend claims against the trust.³⁰²

Duty to Redress Breaches of Former Trustees

In general, a trustee must take reasonable steps to redress a breach of trust known to the trustee to have been committed by a former trustee.³⁰³ However, this duty is subject to important exceptions which are elaborated more fully below.

Duty to Inform and Account

A trustee must keep qualified beneficiaries reasonably informed of the trust and its administration.³⁰⁴ This mandatory duty is also discussed more fully below.

Duty to Administer Pending Outcome of Contest or other Proceeding

In general, while a proceeding to determine the validity or the beneficiaries of all or a part of a trust is pending, a trustee has a duty to administer the trust as if no proceeding had been commenced. An exception applies to actions and distributions in contravention of the rights of persons who may be affected by the outcome of the proceeding. A trustee may not take such actions or make such distributions except upon court direction after notice and good cause shown.³⁰⁵

²⁹⁷ See ss. 736.0809 and 736.0812, F.S.

²⁹⁸ Section 736.0810(1), F.S.

²⁹⁹ Section 736.0810(2) and (3), F.S.

³⁰⁰ Section 736.0810(4), F.S.

³⁰¹ Section 736.08105, F.S.

³⁰² Section 736.0811, F.S.

³⁰³ See s. 736.0812, F.S.

³⁰⁴ See s. 732.813, F.S.

³⁰⁵ See s. 736.08165, F.S. This section is identical to s. 737.208, F.S.

Duty to Expediently Distribute Trust Property on Termination

Upon termination of a trust, subject to the right to retain a reasonable reserve for the payment of debts, expenses, and taxes, a trustee has a duty to expediently distribute trust property to the persons entitled.³⁰⁶

More on the Duty of Loyalty

Under the Code, as between the trustee and the beneficiaries, a trustee has a duty to administer the trust solely in the interests of the beneficiaries.³⁰⁷ Among other things, this means that in the absence of a contrary provision in the trust instrument, a court order, or a specific statutory exception:

- A trustee may not engage in any sale, encumbrance or transaction for its own personal account or that involves a conflict between the trustee's personal and fiduciary interests;³⁰⁸
- An investment by a trustee in an investment owned or controlled by the trustee or affiliate is not presumed to be a conflict;³⁰⁹
- A trustee may not usurp an opportunity properly belonging to the trust;³¹⁰ and
- In voting shares of stock or in exercising powers of control over interests in other enterprises, the trustee must act in the best interest of the beneficiaries.³¹¹ Where the trust is the sole owner of a corporation or other enterprise, this includes the duty to elect or appoint directors and managers who will manage the entity in the best interest of the beneficiaries.³¹²

A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction.³¹³

The Voidable *Per Se* Rule

With some exceptions discussed later, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests is voidable by an affected beneficiary.³¹⁴

³⁰⁶ Section 736.0817, F.S. The final sentence of the section stating that "the provisions of the section are in addition to and are not in derogation of the rights of a trustee under the common law with respect to final distribution of a trust" are intended to insure that this section does not override the holdings of cases such as *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000) and *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, Inc.*, 832 So. 2d 948 (Fla. 2d DCA 2002).

³⁰⁷ See generally, s. 736.0802, F.S.

³⁰⁸ Section 736.0802(2), F.S.

³⁰⁹ Section 736.0802(5)(a), F.S.

³¹⁰ See s. 736.0802(4), F.S.

³¹¹ Section 736.0802(6), F.S.

³¹² Id. Accord UTC s. 802(g). The comments to the UTC section contain the following statement with respect to this duty: "Thus, for example, a trustee whose duty of impartiality would require the trust to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trust must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality."

³¹³ Section 736.0802(9), F.S.

³¹⁴ Section 736.0802(2), F.S. This is a *per se* rule. Hence, good faith and reasonableness are not defenses. Neither is the presence of consideration, a lack of harm, or the presence of a profit or benefit to the trust, although each of these factors may impact on a beneficiary's decision whether to act on the breach.

The fact that an offending transaction is voidable rather than void is a change in Florida law.³¹⁵ The change is significant in the following respects:

- The right of an affected beneficiary to void a transaction is subject to the rights of persons dealing with or assisting the trustee in good faith.³¹⁶
- A beneficiary's action can be precluded by an effective consent, ratification, or release³¹⁷ or by a failure to commence an action within the applicable limitations period.³¹⁸

The Presumptively Voidable Rule

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business³¹⁹ or personal ties³²⁰ to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.³²¹ Accordingly, the transactions are not voidable *per se*; they are voidable only if the presumption is not rebutted.³²²

Affiliated Services

A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company. Such a transaction is not presumed to be affected by a conflict between personal and fiduciary interests so long as the investment complies with chapters 518³²³ and 660³²⁴, and the trustee complies with the disclosure requirements.³²⁵ The requirements of disclosure are that all qualified beneficiaries are: noticed regarding the investment; provided the identity of the investments; and the nature of the relationship of the trustee to the affiliate.³²⁶

³¹⁵ Compare *Barnhart v. Hovde*, 490 So. 2d 1271 (Fla. 3d DCA 1986) (Where trustee failed to get court approval in advance of a transaction involving a conflict of interest, the transaction was void).

³¹⁶ See s. 736.0802(2), F.S., introductory clause. On the protection of persons dealing with a trustee, see s. 736.1016, discussed *infra* at p. 51.

³¹⁷ Section 736.0802(2)(d). On the effectiveness of consents, ratifications and releases, see s. 736.1012, F.S. See also the representation provisions of Part III of the Code.

³¹⁸ Section 736.0802(2)(c), F.S. On the statute of limitations on proceedings against trustees, see s. 736.1005, F.S., discussed *infra* at p. 50.

³¹⁹ This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment. Section 736.0802(c) and (d), F.S.

³²⁰ This includes the trustee's spouse and the trustee's descendants, siblings, parents or the spouse of any of them. Section 736.0802(3)(a) and (b), F.S.

³²¹ Section 736.0802(3), F.S.

³²² According to the comments to UTC section 802 from which s. 736.0802, F.S. is partially derived, factors relevant to this determination include the fairness of any consideration involved and whether the other terms of the transaction are similar to those that would be found in a transaction involving an independent party.

³²³ See in particular s. 518.11, F.S., Florida's Prudent Investor rule, which provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes of the trust. In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.

³²⁴ Chapter 660, F.S. governs trust business and in part precludes self dealing, s. 660.40, F.S.

³²⁵ Section 736.0802(5)(a), F.S.

³²⁶ The requirements of s. 736.0802(5), F.S. do not apply to qualified investment instruments or to a trust for which a right of revocation exists, s. 736.0802(5)(e)(1), F.S. However, the requirements of s. 736.0802(5), F.S. do apply to irrevocable trusts created on or after July 1, 2007, the assets of which are valued in excess of five million dollars on the date the trust was created, s. 736.0802(5)(e)(2), F.S.

Exceptions

In the interests of a fair, effective and efficient trust administration, the Code includes several exceptions to the basic duty of loyalty. Notwithstanding the potential presence of a conflict between the personal and fiduciary interests of a trustee, the trustee's duty of loyalty does not preclude any of the following:

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;³²⁷
- Transactions between the trust and another trust, a decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;³²⁸
- A deposit of trust money in a regulated financial-service institution operated by the trustee;³²⁹
- An advance by the trustee of money for the protection of the trust,³³⁰ or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties³³¹ or the employment of agents to perform any act of administration, whether or not discretionary.³³²

Duty to Redress Breaches of Former Trustees

As mentioned previously, as a general rule a trustee must take reasonable steps to redress a breach of trust known to the trustee to have been committed by a former trustee.³³³ This duty is qualified, however, by s. 736.08125, F.S. which details several instances where a successor trustee has no personal liability for actions³³⁴ of a prior trustee.³³⁵

Under Code s. 736.08125, F.S., there is no personal liability, nor is there any *duty* to institute proceedings against a prior trustee.³³⁶

- When the successor trustee succeeds a settlor serving as trustee of a revocable trust;
- As to any beneficiary who has waived a required accounting, but only as to the periods included in the waiver;
- As to any beneficiary who has effectively released the successor trustee of its duty to institute a proceeding or file a claim; or
- As to any person who is not a qualified beneficiary.³³⁷

³²⁷ Section 736.0802(7)(a) and (b), F.S.

³²⁸ Section 736.0802(7)(c), F.S.

³²⁹ Section 736.0802(7)(d), F.S.

³³⁰ Section 736.0802(7)(e), F.S.

³³¹ Section 736.0802(8), F.S. The trustee may act without independent investigation on their recommendations.

³³² *Id.*

³³³ Section 736.0812, F.S.

³³⁴ The term actions includes a failure to act. Section 736.0103(1), F.S.

³³⁵ Section 736.08125, F.S. is substantively similar to s. 737.306(3) - (6), F.S. As under existing law, the section speaks only to the personal liability of successor trustees. Nothing in the section affects the liability of a prior trustee or the right of a successor trustee or any beneficiary to proceed against the prior trustee. Section 736.08125(7), F.S.

³³⁶ Or the estate of a prior trustee.

³³⁷ Section 736.08125(1) - (4), F.S.

In addition, there is no personal liability with respect to a qualified beneficiary:

- For any action or claim that the qualified beneficiary is barred from bring against the prior trustee;³³⁸
- If the qualified beneficiary fails to act within 6 months after the date the successor trustee accepts the trusteeship and delivers a written notice to the beneficiary;³³⁹ or
- If a super majority of the eligible beneficiaries have released the successor trustee.³⁴⁰

Duty to Inform and Account

Under s. 736.0813, F.S., a trustee must keep the qualified beneficiaries of an irrevocable³⁴¹ trust reasonably informed of the trust and its administration.³⁴² The extent of this duty, which is limited to the qualified beneficiaries, is described in detail in the five paragraphs of s. 736.0813(1), F.S., each of which is included on the list of mandatory provisions.³⁴³ According to these paragraphs, a trustee's duty to inform and account includes, but is not limited to, a duty with respect to the qualified beneficiaries to:

- Notify them of the trustee's acceptance of the trust and the full name and address of the trustee within 60 days after the trustee's acceptance;³⁴⁴
- Notify them of the existence of the trust, the identity of the settlor, the right to request a copy of the trust instrument, and the right to accountings within 60 days of when the trustee acquires knowledge of the creation of an irrevocable trust or that a formerly revocable trust has become irrevocable;³⁴⁵
- Upon reasonable request, furnish them with a complete copy of the trust instrument;³⁴⁶
- Once a trust becomes irrevocable, furnish a trust accounting to them annually as well as on termination of the trust or on a change of trustee;³⁴⁷ and
- Upon reasonable request, provide them with relevant information about the trust's assets and liabilities and the particulars of the trust administration.³⁴⁸

³³⁸ Section 736.08125(5)(c), F.S.

³³⁹ In addition informing the qualified beneficiary of the trustee's acceptance of the trusteeship in accordance with section 736.0813(1)(a), F.S. (see infra p. 41), the written notice must advise the beneficiary that the right to proceed against the successor trust will be barred unless the beneficiary delivers a written request to the trustee within 6 months after the date of the trustee's acceptance. Section 736.08125(5)(b), F.S.

³⁴⁰ Section 736.08125(5)(a), F.S. For purpose of this final exception, eligible beneficiaries is defined to be a subset of the qualified beneficiaries. The intermediate qualified beneficiaries described in s. 736.0103(14)(b), F.S. are excluded from the subset unless, at the time the determination is being made, there are no qualified beneficiaries described in section 736.0103(14)(c), F.S. See s. 736.08125(6)(a), F.S. A super majority of eligible beneficiaries means at least two-thirds in interest of the eligible beneficiaries if their interests are reasonably ascertainable; otherwise, it means at least two-thirds in number of the eligible beneficiaries. Section 736.08125(6)(b), F.S.

³⁴¹ While a trust is revocable, a trustee's duty to inform and account is owed only to the settlor. Section 736.0603(1), F.S.; 736.0813(4), F.S.

³⁴² The representation provisions of Part III of the Code apply with respect to the rights of a qualified beneficiary under s. 736.0813, F.S.. Section 736.0813(3), F.S.

³⁴³ See s. 736.0105(2)(q) – (s), F.S. Section 736.0813, F.S. applies only with respect to accountings rendered for periods beginning on or after January 1, 2008.

³⁴⁴ Section 736.0813(1)(a), F.S.

³⁴⁵ Section 736.0813(1)(b), F.S.

³⁴⁶ Section 736.0813(1)(c), F.S.

³⁴⁷ Section 736.0813(1)(d), F.S.

Trustee Powers

The powers of a trustee are detailed in several sections of the Code. These provisions apply only in the absence of a contrary limitation or restriction in the trust instrument.

General Powers

In addition to powers granted in the trust instrument and those provided in other sections of the Code, s. 736.0815, F.S. states generally that a trustee's powers include any powers that are appropriate to achieve the proper investment, management and distribution of the trust property as well as all powers that an unmarried competent owner has over individually owned property. These powers may be exercised without authorization of the court.

Specific Powers

In a more informative provision, s. 736.0816, F.S. contains a detailed listing of powers that a trustee automatically has in the absence, of course, of a contrary provision in the trust instrument. While space does not permit an exhaustive listing of these powers, it is worth noting that this section serves the same function as s. 737.402, F.S. Although the wording and ordering of the powers included in the two provisions differs, it is the Committee's view that all powers included in s. 737.402, F.S. are also covered by section 736.0816. In addition, under s. 736.0816, F.S., a trustee has authority to:

- Exercise federal, state and local tax elections;³⁴⁹
- Select payment options, exercise rights, and take other appropriate actions with respect to retirement plans, annuities and insurance contracts payable to the trust;³⁵⁰
- Make loans, including to a beneficiary, with terms and conditions that are fair and reasonable under the circumstances;³⁵¹ and
- On termination of a trust, exercise powers appropriate to the winding up of the trust and the distribution of the trust property, subject to a right to retain a reasonable reserve for the payment of debts, expenses, and taxes.³⁵²

Environmental Powers

Code s. 736.08163, F.S. incorporates almost verbatim³⁵³ the provisions of current s. 737.4025, F.S. dealing with a trustee's rights and powers (and the concomitant protection from personal liability) when a trust includes or might include environmentally contaminated property.

³⁴⁸ A little more about these duties. The initial two duties above do not apply to irrevocable trusts created (or revocable ones that became irrevocable) before the effective date of the Code. In addition, the first provision does not apply to a trustee who accepts a trust (whether revocable or irrevocable) before that date. See the language following s. 736.0813(1)(e), F.S. The contents of the required accounting are detailed in s. 736.08135, F.S. This section is effective for all trust accountings rendered for any accounting period beginning on or after January 1, 2003. Section 736.08135(3), F.S. This section is identical with s. 737.3035, F.S. with the addition of a requirement that a trustee's final accounting include a plan of distribution for any undistributed assets shown on the accounting. Section 736.08135(2)(f), F.S. And a qualified beneficiary may waive (or withdraw a prior waiver of) the right to one or more accountings, including a final accounting. Section 736.0813(2), F.S., and a withdrawal of a prior waiver is effective only for accounting for future periods.

³⁴⁹ Section 736.0816(17), F.S.

³⁵⁰ Section 736.0816(18), F.S.

³⁵¹ Section 736.0816(19), F.S. The trustee has a lien on future distributions for repayment of any loans.

³⁵² Section 736.0816(25), F.S.

Power to Delegate to Agents

Under s. 736.0807, F.S., a trustee may delegate duties and powers that a prudent trustee of comparable skill could properly delegate under the circumstances. The trustee must exercise reasonable care, skill and caution in selecting the agent, in defining the scope and terms of the delegation, and in supervising the agent.³⁵⁴ In accepting a delegation, an agent submits to the jurisdiction of Florida courts³⁵⁵ and thereafter owes a duty to exercise reasonable care to comply with the terms of the delegation.³⁵⁶ A trustee who properly delegates duties and powers under the strictures of s. 736.0807, F.S. is not liable for the acts of the agent.³⁵⁷

Powers to Direct

For various reasons, it is sometimes desirable that someone have the power to direct the trustee's actions and decisions with respect to the trust. Code s. 736.0808, F.S. deals with this topic. As there is no statutory equivalent under existing law, this section provides useful clarification.

By Settlor of Revocable Trust

While a trust is revocable, the settlor has the power to direct the trustee whether or not it is explicitly stated in the terms of the trust. Thus, with two important caveats, the trustee of a revocable trust may follow a direction of the settlor even when the direction is contrary to the terms of the trust.³⁵⁸ The two caveats relate to the formalities required for a settlor's direction to be effective. To the extent the direction relates to an act that is either expressly prohibited or is not authorized in the terms of the trust, as opposed to one relating to an exercise of discretion the trustee already possesses, the direction is, in effect, a trust amendment.³⁵⁹ As such, the direction must be manifested in a manner that substantially complies with any provisions in the trust instrument pertaining to trust amendments.³⁶⁰ Moreover, if the direction relates to a "testamentary aspect" of the trust, the direction must comply with the requirements of s. 736.0403(2)(b), F.S.³⁶¹ That is, it must be made in a written instrument executed with testamentary formalities.³⁶²

³⁵³ Apart from a simplification of the section title, the only difference between the two sections is that the definition of "environmental law" was removed from section 736.08163 in favor of the more generally applicable definition found in s. 736.0103(5), F.S.

³⁵⁴ See s. 736.0807(1), F.S.

³⁵⁵ Section 736.0807(4), F.S.

³⁵⁶ Section 736.0807(2), F.S.

³⁵⁷ Current law permits delegations of: investment functions (including special provisions relating to life insurance trusts) under s. 518.112, F.S., and somewhat more indirectly, functions relating to trust administration under the general authority to employ agents under s. 737.402(2)(y), F.S. The former remain available under the Code. The provisions of s. 737.402(2)(y), F.S. are replaced with the Code's more comprehensive s. 736.0807, F.S. under which any duty or power may be delegated provided the delegation would be proper for a trustee of comparable skill. Apart from its increased scope, Code s. 736.0807, F.S. makes one other important change. Section 737.402(2)(y), F.S. states that trustees may act without independent investigation of an agent's recommendations. A similar statement is found in Code s. 736.0816(20), F.S. The apparent conflict between this provision and the duties imposed in s. 736.0807(1)(c), F.S. is a matter of uncertainty. Section 736.0807, however, contemplates a continuing duty to review and monitor an agent's actions and performance. See s. 736.0807(1)(c), F.S.

³⁵⁸ Section 736.0808(1), F.S.

³⁵⁹ On the equivalency of a settlor's direction to a trust amendment, see the comments to UTC s. 808.

³⁶⁰ Section 736.0701(1)(a), F.S., discussed supra p. 30.

³⁶¹ Section 736.0403(2)(b), F.S. is discussed supra p. 30.

³⁶² As a matter of best practice, because of the concerns discussed in the preceding paragraph, whenever possible, trustees of revocable trusts should insist that settlor's directions be made in a written instrument executed with testamentary formalities and that they substantially comply in other respects with the terms of the trust.

Other Directions

With respect to a power to direct given to others (or to settlors of irrevocable trusts), the power must be expressly granted in the terms of the trust. It may be given to a beneficiary or to some other person in which case the other person is presumptively a fiduciary. As such, the person:

- Is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries; and
- Is liable for any loss resulting from a breach of that duty.³⁶³

A power given to someone other than the settlor of a revocable trust may include the power to direct modification or termination of the trust,³⁶⁴ or the power to direct the actions of the trustee in which latter case the trustee may act in accordance with a direction unless the direction is either manifestly contrary to the terms of the trust or the trustee knows that the direction would constitute a serious breach of the power holder's fiduciary duty described above.³⁶⁵

Tax Savings

The Code contains two provisions targeted generally at the protection of trusts from inadvertent and adverse tax consequences. Both have an antecedent in Chapter 737, F.S.

Duty to Distribute Income of Marital Trust

Absent a contrary provision in the trust instrument, Code s. 736.08147, F.S. directs that income from a trust which gives the settlor's spouse a right to income must be distributed no less frequently than annually. This provision is intended to insure the qualification of marital trusts for the gift and estate tax marital deductions. It is identical in effect to current s. 737.3053, F.S., although a slight change in wording was made to restrict application of the section to the lifetime of the surviving spouse.

Limitations on a Trustee's Power to Distribute to Itself

Code ss. 736.0814(2)-(5), F.S. are intended to protect trustees who are also beneficiaries of the trust from having adverse estate tax consequences because of their distribution and administration powers with respect to the trust. The section is based on and serves an identical purpose to current s. 737.402(4), F.S. Under s. 736.0814(2), F.S., in the absence of an express provision in the terms of a trust indicating that one or more of the following rules are not to apply, a trustee may not directly or indirectly:³⁶⁶

- Make distributions of income or principal to or for its own benefit other than distributions subject to an ascertainable standard;³⁶⁷
- Make distributions of income or principal to satisfy the trustee's support obligations;³⁶⁸ or

³⁶³ Section 736.0808(4), F.S.

³⁶⁴ A power to direct trust modification or termination may also be given to a trustee. See s. 736.0808(3), F.S.

³⁶⁵ Section 736.0808(2), F.S.

³⁶⁶ *E.g.*, through an exercise of a power to remove or to replace a trustee in a manner that causes some other person to do an act the trustee is prohibited under the section from doing directly. See s. 736.0814(2)(d), F.S. See also the statement in s. 736.0814(5), F.S. that a person who has the right to remove or to replace a trustee does not, by virtue of that authority, possess the powers of the trustee who may be removed or replaced. The effectiveness of this statement for tax purposes is unclear.

³⁶⁷ Section 736.0814(2)(a), F.S.

³⁶⁸ Section 736.0814(2)(c), F.S.

- Make discretionary allocations of receipts or expenses to directly enlarge or shift beneficial interests in the trust.³⁶⁹

Alternative Exercise

A power whose exercise is limited or prohibited under the above rules may be exercised by any remaining trustees, or in the absence of a remaining trustee, by a person appointed by the Court on application of any qualified beneficiary.³⁷⁰

Exceptions

Notwithstanding the prohibitions listed above, exceptions are provided for:

- Trustees (whether the settlor or other person) of revocable or amendable trusts;³⁷¹
- A power held by the trust settlor;³⁷² and
- Trusts where application of the restrictions could jeopardize an intended tax benefit, such as a marital deduction trust where the settlor's spouse serves as trustee;³⁷³ or a trust qualifying for the annual exclusion under s. 2503(c) of the Internal Revenue Code.³⁷⁴

Trust Investments (Part IX)

As was mentioned previously, Part IX of the Code consists of a single section that incorporates the provisions of Chapter 518, F.S.; Florida's Prudent Investor rule. This rule provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.³⁷⁵ In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.³⁷⁶

Liability of Trustees and Rights of Persons Dealing with Trustee (Part X)

Part X is one of the longer parts of the Code. In the order discussed below, it deals with the remedies and damages for breach of trust; liability of trustees to nonbeneficiaries, the entitlement, assessment and recovery of costs and fees; limitations on actions against a trustee; and the protection of persons dealing with the trustee including those relying on a certification of trust furnished by the trustee.

Liability of Trustees for Breach of Trust

A trustee is not an insurer. Thus, absent a breach of trust, a trustee is not liable for a loss or depreciation in trust value or for not making a profit.³⁷⁷ On the other hand, except as discussed below, a trustee *is* liable for a breach of trust, a concept that includes among others, a violation (intentional or not) of any of the duties discussed previously that the trustee owes to a beneficiary.³⁷⁸

³⁶⁹ Section 736.0814(2)(b), F.S.

³⁷⁰ Section 736.0814(4), F.S.

³⁷¹ Section 736.0814(3)(c), F.S.

³⁷² Section 736.0814(3)(a), F.S.

³⁷³ Section 736.0814(3)(b), F.S.

³⁷⁴ Section 736.0814(3)(d), F.S.

³⁷⁵ Section 518.11(1)(a), F.S.

³⁷⁶ *Id.*

³⁷⁷ Section 736.1003, F.S. Accord *Boalt v. Hanson*, 412 So. 2d 880 (Fla. 3d DCA 1982); *Wohl v. Lewy*, 505 So. 2d 525 (Fla. 3d DCA 1987).

³⁷⁸ See s. 736.1002(1), F.S.

Protection of Trustees from Liability When Trustee Acts in Reasonable Reliance on Trust Instrument

Although a breach of trust has occurred, new Code s. 736.1006, F.S. insulates a trustee from liability if the breach resulted from the trustee's reasonable reliance on the terms of the trust as expressed in the trust instrument.³⁷⁹

For Losses Resulting from Certain Unknown External Events

In some cases, the terms of a trust or the duties and powers of a trustee may depend on the status of certain external events such as the marriage, divorce, educational status or death of beneficiaries or other persons. At common law, a trustee is strictly liable for misdelivery regardless of the trustee's level of care. Code s. 736.1007, F.S., which is based on Uniform Code s. 1007, changes this rule. It protects; a trustee who has exercised reasonable care to ascertain the happening of the event from liability for losses resulting from the trustee's lack of knowledge of the event. The comments to the Uniform Code section clarify that the events listed in the section are not exclusive.

Effect of Beneficiary's Consent, Release, or Ratification

Code s. 736.1012, F.S. deals with the impact of a beneficiary's consent, release or ratification of a trustee's actions. As a general principle, a trustee is not liable to a beneficiary who has consented to the conduct that constitutes a breach or who has released the trustee from liability or ratified the offending transaction. This principle does not apply, however, to consents, releases or ratifications that were:

- Induced by the trustee's improper conduct; or
- Made by a beneficiary who did not know of its rights and the material facts relating to the breach.

Effect of Term Exculpating Trustee from Liability

Code s. 736.1008, F.S. restricts the enforceability of a term in a trust that attempts to relieve a trustee of liability for a breach of trust. The restrictions are mandatory; they may not be relaxed in the trust instrument.³⁸⁰

Under the section, an exculpatory term may not relieve a trustee of liability for breaches committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.³⁸¹ In addition, an exculpatory term is unenforceable if it was inserted as a result of an abuse of a fiduciary or confidential relationship between the trustee and settlor.³⁸² This latter restriction applies to terms that were drafted or caused to be drafted by the trustee unless the trustee proves that the term is fair and its existence and contents were adequately communicated *directly* to the settlor.^{383 384}

³⁷⁹ This provision is derived from Uniform Code s. 1006. It is intended to protect trustees from liability arising from subsequent inconsistent reformations of a trust instrument to remedy a mistake of fact or law or from the fact that the terms of a trust may not always be manifested comprehensively in the trust instrument.

³⁸⁰ Section 736.0105(2)(u), F.S.

³⁸¹ Section 736.1011(1)(a), F.S.

³⁸² Section 736.1011(1)(b), F.S.

³⁸³ Section 736.1011(2), F.S.

³⁸⁴ Section 736.1011, F.S. is derived from Uniform Code s. 1008. The Committee added the requirement that a term drafted by or at the direction of the trustee be *directly* communicated to the settlor to indicate the Committee's disapproval of a statement in the comments to UTC s. 1008 that disclosure to the settlor's attorney would suffice for this purpose.

Remedies and Damages for Breach of Trust

Section 736.1001(2), F.S. contains a nonexclusive list of actions a court may take with respect to a breach of trust.³⁸⁵ According to the section, a court may:

- Suspend or remove the trustee;
- Enjoin, void, or compel actions by the trustee including the performance of the trustee's duties and the issuance of accountings;
- Reduce or deny the trustee's compensation;
- Compel the trustee to pay money or to restore trust property; and
- Impose a lien or a constructive trust on trust property and recover wrongfully disposed of trust property or its proceeds.

Damages

In those cases where the court finds that it is appropriate for a trustee to respond in damages for a breach of trust, s. 736.1002, F.S. states that the trustee's liability is the greater of any profit the trustee made from the breach and the amount required to restore the trust to what it would have been but for the breach, including lost income, capital gain, or appreciation that would have resulted from a property administration.³⁸⁶

Contribution

Depending on the circumstances, more than one person can be liable for a single breach of trust. This can occur, for example, when there are cotrustees or when a sole trustee acts improperly with the knowing participation of an agent. In both cases, the Code provides new and important clarification on the rights of one liable person to contribution from others.³⁸⁷ The rules discussed below apply both to cases filed after the effective date of the Code and to causes of action for breach of trust pending on that date.³⁸⁸

Section 736.1002(2), F.S. sets out the basic principle that, if more than one person is liable to the beneficiaries for a breach of trust, each liable person is entitled to pro rata contribution from the others.

³⁸⁵ In the absence of extenuating circumstances such as bad faith, gross negligence or recurring breaches, the Committee believed that a court's focus in fashioning a remedy for a breach of trust normally should be the redress of the damage caused by the breach and not the punishment of the trustee. Accordingly, s. 736.1001(3), F.S. suggests that the appropriate remedy for a breach involving a failure to distribute trust property is an order requiring the trustee to make distributions in an amount necessary to restore the trust beneficiaries to their appropriate position. Where the breach involves an improper distribution, the trust may be made whole by compelling the recipient of the distribution to return the distribution. In this regard, Code s. 736.1018, F.S. provides that persons receiving improper distributions must return the assets or funds together with any income or interest, or, if the person does not have the property, its value on the date of disposition together with any income or gain received by the person. Section 736.1018, F.S. is identical to s. 737.209, F.S. When this remedy is unavailable or insufficient, s. 736.1001(3), F.S. suggests that the appropriate remedy for a breach that has resulted in an improper distribution is an order directing the trustee to withhold future distributions. Note however, that the remedies suggested in s. 736.1001(3), F.S. are aspirational. Courts are not bound by them. In appropriate situations, courts may adopt a remedy from the more comprehensive list found in s. 736.1001(2), F.S. or may order any other relief they find appropriate.

³⁸⁶ See s. 736.1002(1), F.S.

³⁸⁷ Much of s. 736.1002, F.S. is based on s. 768.31(4), F.S. dealing with contribution among joint tortfeasors. By its terms, that section does not apply to breaches of trust or other fiduciary obligations. Section 768.31(2)(g), F.S.

³⁸⁸ Section 736.1002(7), F.S.

There are exceptions. No contribution is available for breaches committed in bad faith or to the extent a liable person benefits from the breach.³⁸⁹

Section 736.1002(3), F.S. specifies how the pro rata contribution is to be determined. In addition to stating that general principles of equity apply,³⁹⁰ s. 736.1002(3), F.S. clarifies that pro rata in this context means in proportion to the relative degrees of fault.³⁹¹ Importantly, this determination anticipates more than a mere counting of the number of liable persons. Some evaluation of their relative fault is required. In making this evaluation, a court may treat the collective liability of a group as a single share.³⁹²

Finally, in sequential order, subsections (4) through (6) of s. 736.1002, F.S.,

- Set out detailed rules specifying how the right to contribution can be enforced;
- Provide that an unsatisfied judgment against one liable person does not discharge the liability of others and that satisfaction of the judgment does not impair any right to contribution under the section; and
- Make a court's judgment determining the liability of the persons to the beneficiary binding among the persons for purpose of determining their right to contribution.

Costs and Fees

The Code contains several sections covering the burden of fees and costs. With the usual caveat relating to minor revisions and restructuring, these provisions track corresponding provisions in Chapter 737, F.S. The provisions of the Code dealing with fees and costs include:

- **Section 736.1004, F.S.:** This section is derived from a combination of s. 737.188, F.S. and s. 737.4033, F.S. It applies to costs (including attorney's and guardian ad litem's fees) incurred in actions for breach of a fiduciary duty or challenging an exercise or nonexercise of a trustee's power and in proceedings to modify a trust under ss. 736.04133 - 736.0412, F.S.³⁹³ The section directs the court to award taxable costs and fees as in chancery actions³⁹⁴ and authorizes the court to direct payment from the party's interest, from other property, or from both. Section 736.1004, F.S. makes no change in Florida law.
- **Section 736.1005, F.S.:** This section is substantively identical to that portion of s. 737.2035, F.S. relating to attorney's fees. Under it, an attorney who has rendered services to a trust may apply to the court for an award of reasonable compensation for those services. The section is directed primarily at the compensation of attorneys of beneficiaries and others who render services that benefit the trust. The section authorizes the court to direct from which part of the trust the fees are to be paid. The section also continues the requirement of written notice to nonadverse trustees and the authority of the court to adjust the attorney's compensation for services rendered prior to the notice.
- **Section 736.1006, F.S.:** This section is substantively identical to that portion of s. 737.2035, F.S. that relates to costs other than attorney's fees. Section 736.1006, F.S. provides that a

³⁸⁹ Section 736.1002 (2), F.S.

³⁹⁰ Section 736.1002 (3)(c), F.S.

³⁹¹ Section 736.1002 (a), F.S.

³⁹² Section 736.1002 (3)(b), F.S.

³⁹³ Judicial proceedings arising with respect to s. 736.0412, F.S. actually arise under s. 736.0410(2), F.S.

³⁹⁴ This means that costs may be awarded to the prevailing party, unless equity and fairness dictate otherwise. See *In re Estate of Simon*, 549 So. 2d 210 (Fla. 3d DCA 1989).

court may award costs as in chancery proceedings in all trust proceedings. The court may also direct the part of the trust from which the costs are to be paid.

- **Section 736.1007, F.S.:** This section is substantively identical to s. 737.2041, F.S. It contains rules relating to the compensation of attorneys for ordinary and extraordinary services rendered in conjunction with the administration of a revocable trust after the settlor's death; the impact of a fee agreement between the attorney and the trustee or settlor; and the authority of the court to determine reasonable compensation and to award costs and fees in proceedings involved in determining that compensation.

Liability of Trustees to Third Parties

Codes ss. 736.1013 and 736.1015, F.S. address a trustee's liability to third parties. The latter is a new provision addressing a trustee's liability as a general partner of a partnership entered into or acquired by a trust. The former deals with liability for contracts entered into and torts committed by a trustee during the administration of the trust. Except as noted in the comment below, s. 736.1013, F.S. is substantively identical to current ss. 737.306(1) and (2), F.S.

General Rules for Contracts and Torts

With respect to contracts, a trustee is not personally liable on contracts entered into as a fiduciary in the course of administration of a trust unless the contract so provides or the trustee failed to reveal its fiduciary capacity.^{395 396}

With respect to torts, a trustee is personally liable for torts committed in the course of administration of a trust or for obligations arising from the ownership or control of trust property only if the trustee is personally fault.³⁹⁷

Whether or not a trustee is personally liable under the above rules, a claim based on a contract or tort may be asserted against the trustee in the trustee's representative capacity.³⁹⁸ As is true under existing law, subsequent (or earlier) issues of liability between the trust estate and trustee individually may be determined in a proceeding for accounting, surcharge, indemnification or other appropriate proceeding.³⁹⁹

Trustee's Liability as General Partner

Code s. 736.1015, F.S. is new to Florida law.⁴⁰⁰ It provides trustees with protection against personal liability for contracts and torts entered into by a partnership when the trustee holds an interest as general partner. In this context:

- A trustee is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the partnership interest as long as the trustee was not personally at fault;⁴⁰¹ and.

³⁹⁵ Section 736.1013(1), F.S.

³⁹⁶ Unlike existing law, the Code contains no exception for contracts for attorney's fees.

³⁹⁷ Section 736.1013(2), F.S. *Accord* s. 737.306(1)(b), F.S.

³⁹⁸ Section 736.1013(3), F.S. *Accord* s. 737.306(1)(c), F.S.

³⁹⁹ Section 736.1013(4), F.S. *Accord* s. 737.306(2), F.S.

⁴⁰⁰ The section is derived from UTC. Section 736.1015, F.S. protects only trustees; it does not protect settlors. To the contrary, the section specifically provides that when a trustee of a revocable trust holds a general partnership interest, the settlor is personally liable for contracts and other partnership obligations as if the settlor were a general partner. Section 736.1015 (3), F.S.

⁴⁰¹ Section 736.1015(2), F.S.

- Absent a contrary provision in the contract, a trustee has no personal liability on contracts entered into by the partnership if the trustee's fiduciary capacity was disclosed either in the contract or in a previously filed statement pursuant to the Uniform Partnership (or Limited Partnership) Acts.⁴⁰²

Limitations on Actions Against Trustees

Code s. 736.1008, F.S. specifies limitations periods for claims by a beneficiary against a trustee for breach of trust.⁴⁰³ The section is a reorganized and slightly expanded version of s. 737.307, F.S. under which the applicable limitations period for a particular action can depend on a variety of factors including whether the trustee has filed an interim or final accounting and, if so, whether the matter is disclosed on the accounting.

Matters Adequately Disclosed on a Trust Accounting

With respect to matters adequately disclosed on a trust accounting, the applicable limitations period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting.

When Trustee has Issued a Written Limitation Notice

The shortest limitations period provided in s. 736.1008, F.S. is six months. This period applies to actions on matters the trustee has adequately disclosed on a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.⁴⁰⁴ A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions based on any matter adequately disclosed in the accounting may be barred unless the action is commenced within six months of receipt of the accounting or limitation notice, whichever is later.⁴⁰⁵

More comprehensive definitions of "trust disclosure document" and "limitation notice," as well the detailed rules controlling when a limitation notice is related to a particular disclosure document are specified in ss. 736.1008(4)(a) and (4)(c), F.S.. In all respects, however, these provisions are identical to the corresponding provisions in s. 737.307, F.S.

When There is no Limitation Notice

A significantly longer limitations period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. Here, s. 736.1008(1)(a), F.S. provides that the claims are barred as provided in Chapter 95, F.S. Normally, this will result in a four year limitations with the period beginning on the date of receipt of the adequate disclosure.⁴⁰⁶ An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the discovery rule of s. 95.031(2)(a), F.S. applies. Subject to an overall requirement that the action be commenced within twelve years, the discovery rule provides that the limitations period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.⁴⁰⁷

⁴⁰² Section 736.1015(1), F.S.

⁴⁰³ For the limitations period applicable to actions contesting the validity of a revocable trust after the settlor's death, see s. 736.0604, F.S. discussed supra at p. 31.

⁴⁰⁴ See s. 736.1008(2), F.S.

⁴⁰⁵ See s. 736.1008(4)(c), F.S.

⁴⁰⁶ See s. 95.11(3), F.S. See also s. 736.1008(1)(a), F.S.

⁴⁰⁷ Here again, Code s. 736.1008, F.S. is identical to s. 737.307, F.S.

Matters NOT adequately disclosed on a trust accounting When Trustee has Issued Final Accounting and Given Written Notice to Beneficiary

The provisions of Chapter 95, F.S. discussed above also apply to claims involving matters that have not been adequately disclosed on a trust accounting or other trust disclosure document, but only if:

- The trustee has issued its final accounting for the trust; and
- The trustee has given written notice to the beneficiary of the availability of trust records for examination and that claims based on matters not adequately disclosed in that accounting may be barred unless the action is commenced within the applicable limitations period provided in Chapter 95, F.S.⁴⁰⁸

In this context, in the absence of fraud which would bring the discovery rule into play, the normal limitations period will be four years with the period beginning on the date of receipt of the final trust accounting and required written notice.⁴⁰⁹

When Trustee has NOT Issued Final Accounting or has NOT Given Written Notice to Beneficiary

A careful reading of the portions of s. 736.1008, F.S. discussed so far will reveal that they do not cover the entire universe of factual situations. Specifically, no limitations rules have yet been discussed for matters that have not been disclosed on a trust accounting where either the trustee has not issued a final accounting or, having done so, the trustee has not given the required notice described above.

As to both situations, s. 736.1008(3), F.S. provides that the applicable limitations period is determined under Chapter 95, F.S. That is, the normal limitations period will be the four year period described in s. 95.11(3), F.S. In what may be an important change in existing law, however, the section provides that the cause of action does not accrue (and correspondingly, the limitations period does not commence) until the trust beneficiary has actual knowledge of the trustee's repudiation of the trust or adverse possession of trust assets.⁴¹⁰

Protection of Persons other than Beneficiaries Dealing with the Trustee

The Code contains two sections of interest to persons other than beneficiaries who deal with trustees. Code s. 736.1016, F.S., which is based on Uniform Code s. 1012, provides protection against liability for persons who deal with a trustee in good faith. The section is similar to, but slightly more expansive than, current s. 737.405, F.S. Code s. 736.1017, F.S. which is derived from Uniform Code s. 1013 and for which there is no counterpart in Chapter 737, F.S. provides protection for persons who rely on a certificate of trust furnished by the trustee.

Persons Dealing with Trustee in Good Faith

Section 736.1016, F.S. provides protection to persons (other than beneficiaries) who assist or deal for value with a trustee in good faith and without knowledge that:

- The trustee is exceeding its powers or

⁴⁰⁸ See s. 736.1008(1)(b), F.S.

⁴⁰⁹ Section 736.1008(1)(b), F.S.

⁴¹⁰ The situations described here are unaddressed in s. 737.307, F.S. As a consequence, they would be subject to the general provisions of Chapter 95, F.S. under which, in the absence of fraud, the four year period would begin at the occurrence of the last element constituting the cause of action. Section 95.031(2)(a), F.S. Under this test, unless a failure to account is itself a constructive fraud, a breaching trustee who failed to account could be protected by a silent running of the limitations period behind an unsuspecting beneficiary's back. The Committee believed this to be an inappropriate result because it undermines the incentive trustees should have to fully and adequately account.

- The trustee is actually a former trustee whose trusteeship has terminated.

In addition, the section:

- Relieves a person acting in good faith (other than a beneficiary) from any duty to inquire into the extent of the trustee's powers or the propriety of their exercise; and
- Relieves *any* person acting in good faith from any duty to ensure the proper application of any assets the person delivers to a trustee.

Section 736.1016, F.S. is included on the list of mandatory provisions; the protections it provides may not be altered in a trust instrument.⁴¹¹ The section is similar to current s. 737.405, F.S. Two noteworthy areas of difference include:

- Section 737.405, F.S. does not include a provision protecting persons who in good faith deal with or assist a former trustee whose trusteeship has terminated; and
- By its terms, Code s. 736.1016, F.S. is subservient to other laws (such as the Uniform Commercial Code) relating to commercial transactions and the transfer of securities by fiduciaries.

Persons Acting in Reliance on a Certification of Trust

Except when it is required by law or a judicial proceeding concerning the trust, instead of furnishing a complete copy of a trust instrument to a person (other than a beneficiary) who requests it, Code s. 736.1017, F.S. provides that the trustee may furnish a certification of trust.⁴¹² The section sets out certain required information that must be included in the certification⁴¹³ among which is a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations in the certificate to be incorrect.⁴¹⁴

A person to whom a certificate of trust is furnished may:

- Require copies of excerpts from the trust instrument that designate and empower the trust to act in a particular pending transaction.⁴¹⁵
- Assume without inquiry the existence of any facts contained in the certification;
- Act without liability to any person in good faith reliance on the certification; and
- Enforce against trust property a transaction entered into in good faith reliance on the certification as if the representations contained therein were correct.^{416 417}

⁴¹¹ See s. 736.0105(2)(v), F.S.

⁴¹² Section 736.1017(1) and (8), F.S..

⁴¹³ See s. 736.1017 (1), F.S. for a list of the required contents. A certification of trust need not include the dispositive terms of the trust. Section 736.1017 (4), F.S.

⁴¹⁴ Section 736.1017 (3), F.S.

⁴¹⁵ Section 736.1017 (5), F.S.

⁴¹⁶ See s. 736.1017(6) and (7), F.S.

⁴¹⁷ The right of a certification recipient to act in good faith reliance on the certification applies only when the recipient does not have knowledge that the representations contained in the certification are incorrect. Without more, knowledge of a trust's terms may not be inferred solely because the recipient is in possession of a copy of the trust instrument. See s. 736.1017(6), F.S., final sentence.

Rules of Construction (Part XI)

Part XI contains a series of default rules of construction. As an initial matter, it is worth repeating the admonitions found in the initial section of the Part that, except for the provisions included on the mandatory list in s. 736.0105(2), F.S. (of which there is only one — s. 736.1108 dealing with penalty clauses for contesting trusts), the intent of the settlor as expressed in the terms of the trust controls the legal effect of the trust dispositions. In ascertaining that intent, however, in the absence of a contrary indication in the terms of a trust, the rules of construction set out in Part XI of the Code apply.⁴¹⁸

All of the statutory rules of construction found in Part XI have a counterpart in existing Chapter 737, F.S. One of these — s. 736.1106, F.S. dealing with antilapse and the descendibility of beneficial interests in trust — changes existing law. The others are substantively identical to their Chapter 737, F.S. cousins. New s. 736.1106, F.S. is discussed last.

Carryover Provisions from Existing Law Construction of Generic Terms

Code s. 736.1102, F.S. is identical to s. 737.623, F.S. It provides that in construing a trust, adopted persons and persons born out of wedlock are included in class gift terminology and other terms of relationship in accordance with the rules for determining relationships for purposes of intestate succession.

Multi-Generational Class Gifts

Code s. 736.1103, F.S. provides that gifts to multi-generational classes (such as descendants, heirs, etc.) are *per stirpes*. This provision is identical in intent to s. 737.624, F.S., although the wording of the section was revised to eliminate a potential conflict between this section and new s. 736.1106, F.S. discussed below.

Unlawful and Intentional Killings

Code s. 736.1104, F.S. is identical to s. 737.625, F.S. Under both, a beneficiary who unlawfully and intentionally kills or participates in procuring the death of the settlor or another person on whose death such beneficiary's interest depends is precluded from taking that interest. Instead, the interest devolves as if the slayer predeceased the victim. This rule is triggered by a civil evidentiary standard (the greater weight of the evidence) although a final judgment of murder in any degree is conclusive.

Effect of Dissolution of Marriage on Revocable Trust

Absent a contrary provision in the trust instrument or in a judgment for dissolution of marriage or divorce, s. 736.1105, F.S. provides that provisions in a revocable trust in favor of a spouse become void upon a subsequent divorce, annulment or dissolution of the marriage. The trust is administered and construed as if the spouse were dead. Apart from a title change, this section is identical to s. 737.106, F.S.

Change in Securities; Accessions; Nonademption

Code s. 736.1107, F.S. addresses some commonly occurring constructional issues that arise when a trust beneficiary is entitled to a distribution of specific securities (as opposed to their equivalent value).⁴¹⁹ The section gives the beneficiary:

⁴¹⁸ See s. 736.1016, F.S..

⁴¹⁹ Section 736.1107, F.S. is the trust law counterpart to s. 732.605, F.S. in the Probate Code and is identical in all respect to current s. 737.622, F.S.

- A right to whatever securities remain in the trust at the time the distribution is to occur;
- A right to additional securities of the same issuer held by the trust as a result of a traditional stock split or stock dividend; and
- A right to securities of another issuer held by the trust as a result of merger, consolidation, reorganization, or other similar action initiated by the issuer.

Trust Contest Penalty Clauses

Code s. 736.1108, F.S. is a mandatory provision the initial subsection of which is identical to s. 737.207, F.S. The subsection provides that trust *in terrorem* clauses⁴²⁰ are unenforceable. The second subsection of s. 736.1108, F.S. is new. It is an effective date provision that incorporates the effective date of the legislation originally creating current s. 737.207, F.S. Trusts created before October 1, 1993 are not subject to either provision.⁴²¹

Antilapse and the Descendibility of Beneficial Interests in Trusts

Code s. 736.1106, F.S. is new.⁴²² Like current s. 737.6035, F.S. which it will replace, s. 736.1106, F.S. is concerned with antilapse and the descendibility of beneficial interests in trusts. The new section is applicable to all trusts except those which are irrevocable on the effective date of the Code.⁴²³

Historical Background

Prior to 2003, Florida's only section dealing with antilapse was s. 732.603(1), F.S. of the Probate Code. This section applied only when certain related devisees under a will predeceased the testator. Because the term "devisee" is defined in the Probate Code to exclude the beneficiaries of trusts,⁴²⁴ the prevailing wisdom at the time was that the section did not apply to beneficial interests in testamentary trusts. The impact of the limitation can be illustrated in a brief example.

Example 3 — Lapse of Interest in Testamentary Trust. D executes a will that devises \$100,000 outright to his child C and the residue of his estate in trust "income to Wife for life; remainder in corpus C." D's child, C, predeceases D survived by a daughter GC. Subsequently, D dies, survived by Wife and by GC.

As it existed in 2001, s. 732.603(1), F.S. would preserve the outright devise to C for the benefit of GC. But the gift of the remainder interest to C in the trust would lapse. That particular oddity was remedied in 2001 when s. 732.603(1), F.S. was amended to apply both to certain related predeceasing devisees and to "a beneficiary of a trust created by a will." In addition, the section was extended to apply when C survived D but not life tenant W.⁴²⁵ Then, in 2003, s. 737.6035, F.S. was created to apply similar rules in the case of interests created in living trusts.⁴²⁶

⁴²⁰ I.e., a provisions purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to the trust estate or trust assets. See s. 736.1108(1), F.S.

⁴²¹ For this purpose, a revocable trust is treated as if it was created when the right of revocation terminates. Section 736.1108(2), F.S.

⁴²² Section 736.1106, F.S. is the trust law equivalent of s. 732.603, F.S. (the Probate Code antilapse statute). As is explained more fully below, adoption of s. 736.1106, F.S. requires that conforming amendments be made to s. 732.603, F.S. as well. As these two provisions are related, discussion of the conforming changes that are being made to s. 732.603, F.S. appear below instead of later in the Summary where other conforming changes are considered.

⁴²³ Section 736.1106(5), F.S.

⁴²⁴ See s. 731.201(9), F.S.

⁴²⁵ The 2001 changes became effective January 1, 2002.

⁴²⁶ Section 737.6035, F.S. became effective on June 12, 2003.

Concerns Regarding Current Statutes

The changes made to s. 732.603, F.S. in 2001 and the creation of s. 737.6035, F.S. in 2003 have led to several concerns expressed by commentators:

- The failure to address how these sections apply to powers of appointment, if at all;
- The inadvertent and inappropriate application of s. 737.6035, F.S. to some present interests in trust; and
- The failure of s. 732.603, F.S. to address the situation of a related beneficiary dying without surviving descendants after the testator but before the expiration of the life tenant's interest.
- The failure of s. 737.6035, F.S. to clarify how beneficial interests in *inter vivos* trusts are to be handled when they are not saved for some other beneficiary under the section.⁴²⁷

Of necessity, the formulation of the new Florida Trust Code required a reexamination of s. 737.6035, F.S. In turn, a Committee decision to remedy the problems it found in that section required changes in s. 732.603, F.S. as well. Together, these two provisions constitute a new coordinated and more comprehensive default regime covering antilapse and descendibility issues in both testamentary and nontestamentary contexts. Discussion begins with the changes made to s. 732.603, F.S.⁴²⁸

Revisions to s. 732.603, F.S.

As detailed above, under existing law, lapse and descendibility rules for testamentary trusts appear in s. 732.603, F.S. of the Probate Code while the companion rules for living trusts appear in s. 737.6035, F.S. The division of labor under the new regime is different. Because Code s. 736.1106, F.S. applies to both testamentary and to living trusts, s. 732.603, F.S. is restored to its pre-2002 state. That is, the new version applies only to outright testamentary dispositions.⁴²⁹ In addition, new s. 732.603, F.S. is revised as follows.

- In addition to devises, it now covers interests created by the exercise of testamentary powers of appointment; and
- It incorporates existing Florida case law on the impact of survivorship language in a devise or appointment.

Powers of Appointment

Current s. 732.603, F.S. is not clear on whether and how it applies to outright interests created by the exercise of testamentary powers of appointment. In contrast, new s. 732.603, F.S. explicitly applies to these interests.⁴³⁰

Example 4 — Outright Exercise of Testamentary Power. At his death, D is the life beneficiary of a trust created by his uncle F. Under the terms of the trust, D has a testamentary power to appoint property among D's descendants. D's will

⁴²⁷ For more on these and other problems with s. 732.603, F.S. and s. 737.6035, F.S., see David Powell, *Lapse, Antilapse, and Descendible Beneficial Interests in Trusts*, in ADMINISTRATION OF TRUSTS IN FLORIDA ch 7 (4th Ed. The Florida Bar 2005).

⁴²⁸ In the interest of clarity, the analysis uses the adjective "new" when referencing the newly formulated version of section 732.603.

⁴²⁹ New s. 732.603(4), F.S.

⁴³⁰ See new s. 732.603(2), F.S.

purports to appoint \$100,000 to his child C. But C predeceased D, survived by GC who survived D.

In the absence of a contrary intent, new s. 732.603, F.S. provides that GC becomes entitled to the \$100,000 D tried to appoint to C. Note, however, the following additional observations about this example:

- It is immaterial to the result whether F created D's power in an *inter vivos* or a testamentary instrument.
- Application of new s. 732.603, F.S. assumes that there is no contrary intent indicated in either D's will or in the instrument in which F created D's power.
- GC takes in C's place under new s. 732.603, F.S. only if the relationship test specified in the section is met with respect to F and C. Thus, if F is unrelated to C, the section does not apply whether or not C is related to D.
- In general, it is immaterial to the application of new s. 732.603, F.S. whether D's power is a general one or a special one. With the latter, however, there exists the possibility that the person in whose favor the section operates is outside the class of permissible objects of the power.⁴³¹ The section explicitly permits this unless the language creating the power expressly excludes the substitution of descendants for an object of the power.⁴³²

Words of Survivorship and other Indications of Contrary Intent

Like its predecessor, new s. 732.603, F.S. yields to an indication of a contrary intent. This would include a direction in the testator's will that lapsed gifts are to be added to the residue or that they are to pass instead to an alternate beneficiary. In this regard, the new section also codifies existing Florida case law which holds that mere words of survivorship associated with a testamentary disposition are a sufficient indication of contrary intent.⁴³³ Thus the section would not apply in either Example 3 or Example 4 if D's devise (or appointment) had been "to C *if he survives me*." Likewise, the section would not apply to Example 4 if in creating D's power, F had provided that he could appoint "among his *surviving* descendants."⁴³⁴

Beneficial Interests in Trust

General Effect of s. 736.1106, F.S.

With some exceptions discussed below, Code s. 736.1106, F.S. applies when a beneficiary of a future interest in either a testamentary or an *inter vivos* trust dies before the point at which the beneficiary's interest becomes possessory.⁴³⁵ In such situations, s. 736.1106, F.S. does two things:

- First, it provides that the deceased beneficiary's future interest in the trust is contingent on the beneficiary surviving the point at which the interest takes in possession.
- Second, unless a contrary intent appears in the trust instrument, s. 736.1106, F.S. creates a *per stirpital* alternate gift in such of the deceased beneficiary's descendants as are living at that time.⁴³⁶

⁴³¹ To illustrate, if D's power in the above example had been to appoint among his children instead of his descendants, the operation of new s. 732.603, F.S. will be to preserve the gift for a person (GC) who is not an object of D's power.

⁴³² See new s. 732.603(2), F.S., final sentence.

⁴³³ See *Williams v. Williams*, 152 Fla. 255, 9 So. 2d 798 (Fla. 1942) (dealing with former s. 731.20, F.S.); *In re Estate of Wagner*, 423 So. 2d 400 (Fla. 2d DCA 1982).

⁴³⁴ See new s. 732.603(3)(a), F.S.

⁴³⁵ The section refers to this as the "distribution date." See s. 736.1106(1)(b), F.S.

The effect of the section may be illustrated with the following example.

Example 5 — Beneficial Future Interest in Trust. D dies with a will in which he devises property to a testamentary trust to pay "income to W for life; remainder in corpus to C." C dies after D survived by W and by two children GC-1 and GC-2. Some time later, W dies survived by C's two kids.

On the facts of this example, and again assuming no contrary intent appears in the trust instrument, s. 736.1106, F.S. creates a *per stirptual* alternate gift of C's interest in favor of GC-1 and GC-2.⁴³⁷

Situations where s. 736.1106, F.S. Applies

Section 736.1106, F.S. applies to a broad array of situations where the beneficiary of a future interest⁴³⁸ in a trust dies before the time the interest becomes possessory. The only two exceptions are situations where a contrary intent appears in the instrument and where the beneficial interest involved is one created in a trust that became irrevocable before the effective date of the Code. Thus, in the illustrative context of Example 5, the section would apply:

- Whether the trust in which C held his interest was created by standard transfer or by an exercise of a power of appointment, and in the latter case, whether the power was general or special.
- Whether the transfer (or appointment) by which the trust was created was an *inter vivos* or testamentary one.
- With respect to an *inter vivos* trust, whether the trust is revocable or irrevocable.
- With respect to a testamentary trust, whether C survived the testator or not.
- Whether, the predeceasing beneficiary is an individual or a member of a class.⁴³⁹
- Whether or not the trust settlor and predeceasing beneficiary are related. That is, unlike s. 732.603, F.S. of the Probate Code, there is no relationship test under s. 736.1106, F.S.

The absence of a relationship test in s. 736.1106, F.S. rests on a subtle but important distinction between the underlying rationales for that section compared with the Probate Code antilapse provision. The latter is first, foremost, and exclusively a rule based on presumed intent. The relationship test assumes that that intent differs depending on whether the beneficiary of a testamentary gift is a relative or not. The rationale behind s. 736.1106, F.S. is different. It is found in large part on matters of economy and administrative convenience. To illustrate, consider the impact of s. 736.1106, F.S. to Example 5. Because of the section, C's interest in the example is not descendible. That is, it does not pass at C's death to his successors by will or inheritance. For that reason:

- It is not subject to estate taxation at C's death;

⁴³⁶ Section 736.1106(2), F.S.

⁴³⁷ Astute readers will readily see that the effect of s. 736.1106, F.S. is to turn C's vested interest into a contingent one with alternate gift in his descendants. Note that the alternate gift is in the descendants of D who survive W. If GC-1 predeceased W survived by a child GGC, the remainder will pass half to GGC and half to GC-2 at W's death. It is immaterial whether GGC was born before or after C's death. The result of the situation described in the comment is the same whether GC-1 predeceased W in fact or in law. See s. 736.1106(1)(e), F.S.

⁴³⁸ Section 736.1106, F.S. applies only to future interests. See s. 736.1106(1)(a), F.S.

⁴³⁹ See s. 736.1106(1)(a) and (c), F.S.

- It may not be reached by C's creditors (including the elective share right of C's surviving spouse); and
- It will not be necessary to reopen administration of C's estate at W's subsequent death in order to determine who is entitled to C's interest.

To the above may be added the secondary advantage that in many cases, application of s. 736.1106, F.S. *will* accord with D's probable intent. But the advantages listed above exist regardless of any relationship between D and C. If D's contrary intent in a particular case outweighs the listed advantages, D is free to negate application of s. 736.1106, F.S. in the trust instrument. Unless he does so, however, the better default rule is for the section to apply regardless of any relationship test.

Language Indicating a Contrary Intent

It was mentioned previously, that application of s. 736.1106, F.S. means two things. The first is that vested remainders are now contingent on the taker surviving to the time of possession. The second is that an alternate gift arises in the descendants of a beneficiary who fails to meet the survivorship contingency. As a default rule of construction, both of these principles will yield to a contrary intent in the trust instrument. As a practical matter, however, an instrument would rarely negate application of the first principle because to do so is to invite the problems the section was designed to avoid. It is for this reason that vested remainder interests are seldom found in well drafted trust instruments. The second principle is certain to be less universally acceptable. It is to be expected that many settlors would prefer a different taker for the alternate gift. If so, application of the second principle can be avoided by:

- Expressing a different alternate taker in the instrument;
- Stating the intent that the designated beneficiary's descendants not share in the gift; or
- Attaching words of survivorship to the remainder beneficiary's interest.⁴⁴⁰

By contrast, the mere presence of a residuary clause in a settlor's will is not a sufficient indication of a contrary intent to the application of the second principle and this is true even if the will specifically provides that lapsed or failed gifts are to pass under the residuary clause.⁴⁴¹

Disposition of Remainder Interests when there is no Alternate Taker

In some cases, there will be no eligible alternate taker for the contingent interest arising from an application of the first principle of s. 736.1106, F.S. This can occur if the predeceasing beneficiary left no descendants. It can also occur when the instrument contains language negating the application of the second principle but not language identifying an alternative taker for the interest. In either case, disposition of the interest will depend on whether the interest was created by traditional transfer or by the exercise of a power of appointment.

Interests Created by Traditional Transfer

If the interest was created in a nonresiduary devise in the *transferor's* will, the interest will pass as part of the transferor's residuary estate.⁴⁴² Otherwise it passes to the *transferor's* heirs with the heirs being determined as if the transferor had died intestate at the time the interest takes in possession.⁴⁴³

⁴⁴⁰ On the effectiveness of using words of survivorship for this purpose, see s. 736.1106(3)(a), F.S.

⁴⁴¹ See s. 736.1106(3)(b), F.S.

⁴⁴² Section 736.1106(4)(b), F.S.

⁴⁴³ Section 736.1106(4)(c), F.S.

Example 6 — Residuary devise to testamentary trust – no alternate taker.

D dies with a will in which he devises the residue of his estate to a testamentary trust to pay "income to W for life; remainder in corpus to his child C." D's only other relatives are a brother B and a sister S. C dies after D. He is survived by W, B, and S, but not by any descendants. Thereafter, W dies survived by B and S. At W's death, the property passes to D's surviving heirs, B and S.⁴⁴⁴

Interests Created by Appointment

In general, the rules discussed above for interests created by traditional transfers also apply to interests created by the exercise of a power of appointment. In the case of powers, however, the basic rules are subject to two special wrinkles:

- First, prior to application of the above rules, preference is given to the power donor's gift-in-default clause, if any.⁴⁴⁵
- Second, in the application of the above rules, the *transferor* of an interest created by the exercise of a general power is specified to be the donee of the power while the *transferor* for interests created by the exercise of a special power is specified to be the donor of the power.⁴⁴⁶

Charitable Trusts (Part XII)

Part XII of the Code incorporates most of the sections currently found in Part V of chapter 737, F.S. dealing with charitable trusts. Two current sections (s. 737.510, F.S. and s. 737.512, F.S.) were omitted, the latter because it is obsolete and the former because charitable organizations expressly designated in a trust instrument are given the rights of a qualified beneficiary under Code s. 736.0110(1), F.S. Accordingly, the duties imposed on trustees in s. 737.510, F.S. are unnecessary under the Code.

The remaining sections, and the changes, if any, made to them are listed below.

- **Section 736.1201, F.S.:** This section is derived from s. 737.501, F.S. The order of the definitions for "charitable organization" and "Internal Revenue Code" were switched and changes were made to the definitions of Internal Revenue Code and State attorney. The definition of the former was updated to the 1986 Code and the definition of the latter was tied to the state attorney for the judicial circuit of the principal place of administration of the trust under s. 736.0108, F.S.
- **Section 736.1202, F.S.:** This section is identical to s. 737.502, F.S.
- **Section 736.1203, F.S.:** This section is derived from s. 737.503, F.S. A cross reference to s. 737.505, F.S. was updated to Code s. 736.1203, F.S.
- **Section 736.1204, F.S.:** Section 736.1204, F.S. is derived from s. 737.504, F.S. Gender specific references were replaced with gender neutral ones, cross references to s. 737.505, F.S.

⁴⁴⁴ Some additional observations about the above example: if D's brother B had died before W, the property would pass exclusively to sister S because the class of D's heirs is determined as if D had died intestate at W's death when the remainder interest takes in present possession; the result in the Example (original or as modified above) is the same if D had created the trust by *inter vivos* transfer instead of by will; in the case of an *inter vivos* trust, the result is also the same whether the trust is revocable or irrevocable and whether D predeceases W or not, and since there is no relationship test under s. 736.1106, F.S., all of the above remains true even if D and C are unrelated to each other.

⁴⁴⁵ See s. 736.1106(4)(a), F.S.

⁴⁴⁶ See s. 736.1106(4), F.S., final paragraph.

were updated to Code s. 736.1205, F.S., and some section references were clarified as referring to the Internal Revenue Code.

- **Section 736.1205, F.S.:** This section is derived from s 737.505, F.S. Cross references to s. 737.504, F.S. were updated to Code s. 736.1204, F.S.
- **Section 736.1206, F.S.:** This section is derived form s. 737.506, F.S. References to s. 737.504(2), F.S. were updated to Code s. 736.1204(2), F.S.
- **Section 736.1207, F.S.:** This section is identical to s. 737.507, F.S.
- **Section 736.1208, F.S.:** This section is identical to s. 737.508, F.S.
- **Section 736.1209, F.S.:** This section is derived from s. 737.509, F.S. A reference to s. 737.510, F.S. was deleted and references to s. 737.508(5), F.S. were updated to Code s. 736.1208(5), F.S.
- **Section 736.1210, F.S.:** This section is identical to s. 737.511, F.S.

Miscellaneous (Part XIII)

Part XIII of the Code contains miscellaneous sections. One deals with electronic records and signatures, two with investments by fiduciaries, another with severability, and two with effective date issues.

Electronic Records and Signatures

Section 736.1301, F.S. is a prophylactic provision with no real current effect. It provides that any provisions of the Code relating to the legal effect, validity, or enforceability of electronic records or signatures supersede those found in the Electronic Signatures in Global National Commerce Act. This section appears in all recent Uniform Acts. As the Florida Code contains no such provisions relating to the legal effect, validity, or enforceability of electronic records or signatures, the main impact of the section is that it will insure the primacy of any provisions that may be added in the future.

Investment of Fiduciary Funds Permitted

Section 518.117, F.S. is created to permit a fiduciary that is authorized to engage in trust business to invest fiduciary funds in accordance with s. 660.417, F.S.

Severability

Section 736.1302, F.S. is a standard severability clause that is intended to insure that the invalidity of one or more provisions of the Code will not affect the validity of other provisions.

Investment of Fiduciary Funds

Section 660.417, F.S. is amended to permit affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company and receiving additional compensation for that investment. If a trustee engages in such activity the basis for the calculation of the compensation must be disclosed.

Effective date

The final miscellaneous provisions are found in s. 736.1303, F.S. Section 736.1303, F.S. specifies that the Code takes effect on July 1, 2007, and specifies rules relating to the application of the Code to existing trusts and legal proceedings. These include the following:

- The Code does not affect any act done prior to its effective date.⁴⁴⁷
- The Code does not affect the running of any limitations period that began before the effective date of the Code, even if the statute specifying the period is repealed or superseded by the Code.⁴⁴⁸
- The Code applies to all judicial proceedings concerning trusts commenced on or after its effective date.⁴⁴⁹
- The Code also applies to judicial proceedings commenced before that date unless the court finds its application would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of the parties.⁴⁵⁰
- Finally, except as otherwise provided in a particular section of the Code, the Code applies to all trusts whether created before, on, or after its effective date.⁴⁵¹

The significance of the final point above is worth emphasizing. Except as might be provided above or in a particular section, the Code applies retroactively to all trusts, whenever created. Although this has the advantage of avoiding the maintenance of two systems of trust law for extended periods of time, in some instances retroactive application can be constitutionally impermissible (e.g., where it impairs vested rights) or unfair. For this reason, a number of Code sections include effective date sections that limit the default retroactivity rule of s. 736.1303, F.S. This table lists most of these:

⁴⁴⁷ Section 736.1303(1)(e), F.S.

⁴⁴⁸ Section 736.1303(2), F.S.

⁴⁴⁹ Section 736.1303(1)(b), F.S.

⁴⁵⁰ Section 736.1303(1)(d), F.S.

⁴⁵¹ Section 736.1303(1)(a), F.S.

Specific Effective Dates of Code Provisions to Limit Retroactivity		
Section	Title or topic	Effective date:
736.0403	Trusts created in other jurisdictions; formalities required for revocable trusts	Trusts created after the effective date of the Code.
736.04115	Judicial modification of irrevocable trust when modification is in best interest of beneficiaries	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.0412	Nonjudicial modification of irrevocable trust	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.0813	Duty to inform and account	In general, applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2008. Paragraphs (1)(a) and (b) do not apply to trustees who accept a trusteeship before the effective date of the Code or to trusts that are irrevocable before that date.
736.08135	Trust accountings	Applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2003.
736.08163	Powers of trustees relating to environmental or human health laws or to trust property contaminated with hazardous or toxic substances; liability	Does not apply to trusts created before July 1, 1995, unless the trust is amended to incorporate the provisions of the section.
736.1008	Limitations on proceedings against trustees	Applies to trust accountings for accounting periods beginning on or after January 1, 2008, and to written reports, other than trust accountings, received by a beneficiary on or after January 1, 2008.
736.1108	Penalty clause for contest	Applies to trusts created on or after October 1, 1993. Revocable trusts are treated as created when the right of revocation terminates.

Conforming Changes

In addition to the Code itself, the bill includes a number of conforming and other changes to various sections of the Probate Code and other portions of the Florida statutes. Many of these are just updates to statutory cross references and will not be discussed here. Those with substantive impact are list below.

- **Section 518.117, F.S.:** *New.* This section authorizes investment of fiduciary funds pursuant to s. 660. 417, F.S.
- **Section 660.25, F.S.:** *Revised.* This section provides a definition for "investment instrument."

- **Section 660.417, F.S.: Revised.** This section authorizes trustees to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company.
- **Section 689.075(4), F.S.: Revised.** The second sentence of this subsection was deleted as obsolete.
- **Section 689.175, F.S.: New.** This section abolishes the Doctrine of Worthier title as both a rule of law and a rule of construction. The purposes originally served by that doctrine are no longer relevant and its application can create adverse tax consequences and can impair the validity of special needs trusts.
- **Section 731.103, F.S.: Revised.** The section is made applicable to new Chapter 736; the provision specifying the applicability of the rules of evidence in civil actions is moved to new s. 731.1035, F.S. (below); subsection (4) permitting proof of death by direct or circumstantial evidence before expiration of 5-year time period is added to conform this section to s. 737.626(4), F.S.
- **Section 731.1035, F.S.: New.** This new section is separated out from s. 731.103, F.S. (see above). It specifies that the rules of evidence in civil action apply to proceedings under Probate Code.
- **Section 731.201(2) and (9), F.S.: Revised.** In both of these subsections, a reference to beneficiaries described in s. 737.303(4)(b), F.S. is changed to qualified beneficiary as defined in the new Code.
- **Section 731.201(27), F.S.: New.** This section adds a new definition of "power of appointment."
- **Section 731.303, F.S.: Revised.** This section is amended to limit it to proceedings involving estates and not those involving trusts. In addition, the portions of the section dealing with representation by holders of powers of appointment are subjected to the same restrictions that appear in Code s. 736.0302, F.S. That is, representation does not apply to matters involving a trustee's fraud or bad faith, a power of a trustee to distribute property or to a power held by a person who is the sole trustee.
- **Section 732.513, F.S.: Revised.** Subsection (c) of the section is deleted to remove the implication that a pour over to a revocable trust that is not executed in the manner required for wills is effective.
- **Section 732.603, F.S.: Rewritten.** The revisions to this section have been discussed in detail previously.⁴⁵²
- **Section 732.604, F.S.: Clarified.** Subsection (2) of this section is revised to clarify the meaning it was intended to have all along.
- **Section 732.611, F.S.: Clarified.** The wording of this section was changed to better reflect its intended purpose.
- **Section 732.212, F.S.: Revised.** A reference in this section to beneficiaries described in s. 737.303(4)(b), F.S. is changed to qualified beneficiary as defined in the new Code.
- **Section 738.104, F.S.: Revised.** This section is amended in several places to change references to the previously defined term "beneficiaries" to a newly defined term "eligible

⁴⁵² See "Revisions to s. 732.603, F.S.", supra p. 55.

beneficiaries." Under the new version, it is the eligible beneficiaries of a trust who have standing to object to the use of a trustee's power to adjust with respect to trusts in existence on January 1, 2003. The new term excludes from the class of beneficiaries with standing the middle tier qualified beneficiaries described in Code s. 736.0103(14)(b), F.S. unless there is no third tier qualified beneficiary described in s. 736.0103(14)(c), F.S. The practical effect of the revisions are two fold. First, for most trusts the term eligible beneficiaries will have a meaning very similar to the term "beneficiaries" under the current version of the section. For those trusts where the term differs, the revisions are intended to insure that there will always be two categories of qualified beneficiaries with standing to object to an exercise of the trustee's adjustment power.

- **Section 744.331(6)(b) and (f), F.S.:** *Revised.* These are companion revisions to the change made in Code s. 736.0207, F.S. permitting court approved contests of a revocable trust by a settlor's guardian prior to the settlor's death. Paragraph (b) requires that a court determine whether a sufficient alternative to guardianship exists for a person the court finds to be incapable of exercising delegable rights. If so, the court is precluded from appointing a guardian. If not, the court is required to appoint a guardian for the incapacitated person. Paragraph (f) provides that an incapacitated person's trust, trust amendment, or durable power of attorney is not to be considered a sufficient alternative to guardianship if an interested person files a verified statement that he or she has a reasonable factual basis for believing in good faith that the trust, trust amendment or durable power is invalid.
- **Section 744.441(11), F.S.:** *Revised.* The new language added to this subsection is also a related to new Code s. 736.0207, F.S. Subsection (11) directs that before authorizing a guardian to bring an action under s. 736.0207, F.S., the court must find that the action appears to be in the ward's best interest during the ward's probable lifetime.
- **Section 744.462, F.S.:** *New.* This new section provides for the reporting of a court's finding as to the validity of a ward's trust, trust amendment, and power of attorney and for the continued review by the court of the sufficiency of guardianship alternatives, the continued need for a guardian, and the extent of the need for delegation of the ward's rights.

C. SECTION DIRECTORY:

Section 1. Creating Part I of chapter 736, F.S., consisting of sections 736.0101, 736.0102, 736.0103, 736.0104, 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110, 736.0111, and 736.0112. This section provides a short title, scope, and definitions for the Florida Trust Code (FTC).

Section 2. Creating Part II of chapter 736, F.S., consisting of sections 736.0201, 736.0202, 736.0203, 736.0204, 736.0205, 736.0206, and 736.0207. This section provides for the role of courts in trust proceedings, including, but not limited to, jurisdiction, venue, and trust contests.

Section 3. Creating Part III of chapter 736, F.S., consisting of sections 736.0301, 736.0302, 736.0303, 736.0304, 736.0305, and 736.0306. This section outlines the effect of representation throughout the trust process.

Section 4. Creating Part IV of chapter 736, F.S., consisting of sections 736.0401, 736.0402, 736.0403, 736.0404, 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410, 736.0411, 736.0412, 736.0413, 736.0414, 736.0415, 736.0416, and 736.0417. This section encompasses the methods and requirements for the creation of a trust, trust validity, trust modification, and trust termination.

Section 5. Creating Part V of chapter 736, F.S., consisting of sections 736.0501, 736.0502, 736.0503, 736.0504, 736.0505, 736.05053, 736.05055, 736.0506, and 736.0507. This section details creditors'

claims, and what effect, if any, spendthrift provision may have upon the trust. Furthermore, this section outlines responsibilities of a trustee, and claims against a settlor.

Section 6. Creating Part VI of chapter 736, F.S., consisting of sections 736.0601, 736.0602, 736.0603, and 736.0404. This section gathers in one place most of the provisions relating to revocable trusts. Section 736.601 clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will. Other sections specify the rules to be used to determine if and how a trust may be revoked or amended, the effect revocability has on the duties and liabilities of a trustee and the limitations period for contesting revocable trusts after the death of the settlor.

Section 7. Creating Part VII of chapter 736, F.S., consisting of sections 736.0701, 736.0702, 736.0703, 736.0704, 736.0705, 736.0706, 736.0707, 736.0708, and 736.0709. Part VII of the Code contains the various rules relating to the office of trustee. This includes provisions detailing when and how a designated trustee accepts or declines the office; how trustees may resign or be removed; the powers and duties of a trustee who has resigned or been removed; and when vacancies in the office of trustee must be filled and how successor trustees are appointed. Also covered are the duties and powers of cotrustees, compensation of trustees, and trustees' right to reimbursement for expenses incurred in the administration of the trust.

Section 8. Creating Part VIII of chapter 736, F.S., consisting of sections 736.0801, 736.0802, 736.0803, 736.0804, 736.0805, 736.0806, 736.0807, 736.0808, 736.0809, 736.0810, 736.08105, 736.0811, 736.0812, 736.08125, 736.0813, 736.08135, 736.0814, 736.08147, 736.0815, 736.0816, 736.08163, 736.08165, and 736.0817. This section covers the duties of a trustee, the powers of a trustee, and a few miscellaneous matters.

Section 9. Creating Part IX of chapter 736, F.S., consisting of section 736.0901 which directs that a trustee shall invest trust property in accordance with chapter 518, F.S.

Section 10. Creating Part X of chapter 736, F.S., consisting of sections 736.1001, 736.1002, 736.1003, 736.1004, 736.1005, 736.1006, 736.1007, 736.1008, 736.1009, 736.1010, 736.1011, 736.1012, 736.1013, 736.1014, 736.1015, 736.1016, 736.1017, and 736.1018. This section deals with the remedies and damages for breach of trust; liability of trustees to nonbeneficiaries, the entitlement, assessment and recovery of costs and fees; limitations on actions against a trustee; and the protection of persons dealing with the trustee including those relying on a certification of trust furnished by the trustee.

Section 11. Creating Part XI of chapter 736, F.S., consisting of sections 736.1101, 736.1102, 736.1103, 736.1104, 736.1105, 736.1106, 736.1107, and 736.1108. This section contains a series of default rules of construction.

Section 12. Creating Part XII of chapter 736, F.S., consisting of sections 736.1201, 736.1202, 736.1203, 736.1204, 736.1205, 736.1206, 736.1207, 736.1208, 736.1209, and 736.1210. This section incorporates most of the sections currently found in Part V of Chapter 737, F.S. dealing with charitable trusts.

Section 13. Creating Part XIII of chapter 736, F.S., consisting of sections 736.1301, 736.1302, and 736.1303. This section addresses four miscellaneous sections. One deals with electronic records and signatures, another with severability, and two with effective date issues.

Section 14. This section amends paragraph (a) of subsection (5) of s. 497.458, F.S., relating to the disposition of proceeds received on contracts.

Section 15. This section creates s. 518.117, F.S., relating to what investments of fiduciary funds are permissible.

Section 16. This section amends subsection (2) of s. 607.0802, F.S., relating to qualifications of directors.

Section 17. This section amends subsection (2) of s. 617.0802, F.S., relating to qualifications of directors.

Section 18. This section amends subsections (6) and (7) of s. 660.25, F.S., defining "investment instrument," and correcting references from Chapter 737, F.S. to s. 736.

Section 19. This section amends s. 660.417, F.S., to permit a trustee to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company

Section 20. This section amends paragraphs (a), (d), and (e) of subsection (1) and subsections (2), (3), (9), and (10) of s. 660.46, F.S., relating to the substitution of fiduciaries.

Section 21. This section amends s. 660.418, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 22. This section amends subsection (5) of s. 689.071, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 23. This section amends subsections (1) and (4) of s. 689.075, F.S., relating to *inter vivos* trusts; powers retained by settlor.

Section 24. This section creates s. 689.175, F.S., abolishing the Worthier title doctrine.

Section 25. This section amends subsection (8) of s. 709.08, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 26. This section amends paragraph (c) of subsection (2) of s. 721.08, F.S., to correctly reference sections of s. 736 and not Chapter 737, F.S.

Section 27. This section amends paragraph (e) of subsection (1) of s. 721.53, F.S., to correctly reference sections of s. 736 and not Chapter 737, F.S.

Section 28. This section amends s. 731.103, F.S., regarding evidence as to death or status.

Section 29. This section creates s. 731.1035, F.S., providing in proceedings under the code, the rules of evidence in civil actions are applicable unless specifically changed by the code.

Section 30. This section amends s. 731.201, F.S., regarding general definitions.

Section 31. This section amends paragraph (a) of subsection (1) and subsection (5) of s. 731.303, F.S., regarding representation.

Section 32. This section amends subsection (5) of s. 732.2075, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 33. This section amends subsection (2) of s. 732.513, F.S., relating to devises to trustee.

Section 34. This section amends s. 732.603, F.S., substantially rewording s. 732.603, F.S., relating to antilapse; deceased devisee; class gifts.

Section 35. This section amends s. 732.604, F.S., concerning a failure of testamentary provision.

Section 36. This section amends s. 732.611, F.S., regarding devises to multigenerational classes to be *per stirpes*.

Section 37. This section amends subsection (1) of s. 733.212, F.S., regarding a notice of administration.

Section 38. This section amends subsection (1) of s. 733.602, F.S., to correctly reference a Chapter 736 and not Chapter 737, F.S.

Section 39. This section amends subsection (4) of s. 733.805, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 40. This section amends paragraph (j) of subsection (1) of s. 733.817, F.S., correcting a reference to s. 731.201, F.S.

Section 41. This section amends paragraphs (a) and (f) of subsection (8) and paragraphs (a) and (d) of subsection (9) of s. 738.104, F.S., regarding a trustee's power to adjust.

Section 42. This section amends subsection (4) of s. 738.1041, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 43. This section amends subsection (5) of s. 738.202, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 44. This section amends paragraph (a) of subsection (12) of s. 739.102, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 45. This section amends paragraphs (b) and (f) of subsection (6) of s. 744.331, F.S., relating to orders determining incapacity.

Section 46. This section amends paragraph (a) of subsection (6) of s. 744.361, F.S., correcting a reference to Chapter 518, F.S.

Section 47. This section amends subsections (11) and (18) of s. 744.441, F.S., relating to powers of a guardian upon court approval.

Section 48. This section creates s. 744.462, F.S., concerning determinations regarding alternatives to guardianship.

Section 49. This section repeals ss. 737.101, 737.105, 737.106, 737.111, 737.115, 737.116, 737.201, 737.202, 737.203, 737.2035, 737.204, 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, 737.209, 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308, 737.309, 737.401, 737.402, 737.4025, 737.403, 737.4031, 737.4032, 737.4033, 737.404, 737.405, 737.406, 737.501, 737.502, 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509, 737.510, 737.511, 737.512, 737.6035, 737.621, 737.622, 737.623, 737.624, 737.625, 737.626, and 737.627, F.S.

Section 50. This section provides and effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

By providing settlors and trustees with the ability to take advantage of more flexible trust provisions, this bill may perhaps result in more equitable trust distributions and better tax outcomes for trust beneficiaries.

Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. Under Code s. 736.0505(1), F.S., whether or not a trust includes a spendthrift provision: while a trust is revocable, the trust property is subject to the claims of the settlor's creditors, and in the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum that can be distributed to or for the benefit of the settlor. Therefore, this bill provides creditors with greater protection.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Personal Jurisdiction:

Section 736.0202, F.S. pertains to personal jurisdiction by Florida courts over the trustee, beneficiaries, and recipients of trust distributions. Specifically, s. 736.0202(2), F.S. provides:

With respect to their interest in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the distribution.

The Committee's Scrivener's Summary provides that "F.S. chapter 737 has no provision corresponding to section 736.0602⁴⁵³. Jurisdiction under existing law is obtained under the general long arm statutes found in F.S. chapter 48. The Committee believes that the inclusion of a long arm statute tailored specifically to trust matters is a beneficial addition to Florida law."⁴⁵⁴

Even assuming, for the sake of argument, that the provisions of the Florida Long Arm Statute have been satisfied,⁴⁵⁵ federal due process requirements cannot be minimized. The U.S. Supreme Court has "noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents. A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."⁴⁵⁶

Nevertheless, the U.S. Supreme Court maintains that the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum."⁴⁵⁷ The Court will look to

⁴⁵³ The report points to s. 736.602, F.S., however s. 736.0602, F.S. pertains to revocation or amendment of revocable trusts, therefore it would seem that the reference to s. 736.602, F.S. is merely a scrivener's error and it will be considered as such.

⁴⁵⁴ Committee's Scrivener's Summary, page 12.

⁴⁵⁵ Section 48.193, F.S. provides:

- (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
 - (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
 - (b) Committing a tortious act within this state.
 - (c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.
 - (d) Contracting to insure any person, property, or risk located within this state at the time of contracting.
 - (e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.
 - (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
 1. The defendant was engaged in solicitation or service activities within this state; or
 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.
 - (g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.
 - (h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.
- (2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.
- (3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.
- (4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.
- (5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.

⁴⁵⁶ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)(citations omitted).

⁴⁵⁷ *Rudzewicz*, 471 U.S. 474-75 (citations omitted).

the individuals "conduct and connection with the forum State" to determine if that person "should reasonably anticipate being haled into court there."⁴⁵⁸ In seeking to make this determination, the court will attempt to determine if an individual has purposefully availed himself or herself of the "privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁴⁵⁹

"This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State."⁴⁶⁰

Furthermore, in determining whether due process requirements are met, the Florida Supreme Court has set forth a "twofold constitutional inquiry: (1) whether the acts or the nonresident defendant give rise to sufficient 'minimum contacts' with the forum such that (2) maintaining a suit there 'does not offend traditional notions of fair play and substantial justice.'"⁴⁶¹ Factors to consider in whether minimum contacts have been established include "whether sufficient minimum contacts exist including the foreseeability that the defendant's conduct will result in suit in the forum state and the defendant's purposeful availment of the forum's privileges and protections."⁴⁶² In other words, even though an individual may appear to fall within the reach of the long arm statute, personal jurisdiction over that nonresident may run afoul of the due process requirements of the U.S. Constitution unless minimum contacts with Florida can be established.

Section 736.0202, F.S., which authorizes personal jurisdiction over an out of state resident solely upon the receipt of a distribution from a trust located in Florida, may perhaps be challenged by a nonresident whose only contact with Florida was cashing a check received in the mail.

Formalities for Creation of a Trust:

Section 736.0403(2)(b) provides: "The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state. For the purpose of this subsection, the term 'testamentary aspects' means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate."

The Committee's Scrivener's Report provides the following analysis of this section:⁴⁶³

A failure to comply with the requirements of section 736.0403(2)(b) does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate."

The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Rudzewicz*, 471 U.S. at 475-76. (emphasis in original)(citations omitted).

⁴⁶¹ *Georgia Insurers Insolvency Pool v. Brewer*, 602 So. 2d 1264, 1268 (Fla. 1992)(citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

⁴⁶² *Id.* (citing *Rudzewicz*, 471 U.S. 462 (1985)).

⁴⁶³ Committee Report, pages 19-20.

Section 736.0403(2)(b) has no applicability to trusts created by non Florida domiciliaries whether or not the trust was executed in Florida.

Conversely, section 736.0403(2)(b) does not contain an "out" for trusts executed in other states. The section applies to revocable trusts created by Florida domiciliaries regardless of the place of execution and regardless of the location of the property held in the trust.

Section 736.0403(2)(b), F.S. may invalidate testamentary aspects of a trust created by a Florida domiciliary in another state regardless of whether the corpus of the trust is outside of Florida. By way of example the above language would seem to preclude a Floridian from executing a trust in New York with testamentary aspects which seeks to solely dispose of property located in New York unless New York has identical to formalities to Florida required for the execution of a will. Such a result may create a potential conflict of laws problem.

B. RULEMAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Bankers Association supports the bill and advises⁴⁶⁴ that it contains provisions that

would allow professional trustees more investment options for their customers by removing strict prohibitions on sophisticated investment products offered by or through the trustee or an affiliate. Professional trustees already enjoy this freedom on mutual funds, common trust funds and money market funds. This legislation would expand the authority to investments that are customarily seen only in large trusts.... We believe that the bill may also reduce customer fees.... Currently, Delaware, Ohio and Illinois have such provisions in their laws... The [CS] would help keep Florida competitive in the trust industry.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2005, the Civil Justice Committee adopted an amendment removing everything after the enacting clause. The amendment modified the bill in the following manner:

- Changed the presumption on an unproductive trust to that of current law (\$50,000);
- Removed the definition of "person" from the bill;
- Modified the governing law provisions of s. 736.0107, F.S. to provide that in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is created controls. Moreover, a designation in the terms of the trust is not controlling as to any matter for which the designation would be contrary to a strong public policy of Florida;
- Removed "the interest of the beneficiaries" from consideration of a trustees' duty where to administer the trust;
- Authorized a trustee to invest in investment instruments that are controlled by the trustee or its affiliate or from which the trustee or affiliate receives compensation, provides for notice of this to beneficiaries, and establishes a method by which a beneficiary may file an objection with the trustee;

⁴⁶⁴ Correspondence from C. Scott Jenkins, Vice President of Governmental Affairs, dated February 8, 2006, on file with the Committee on Elder & Long-Term Care.

- Created s. 518.117, F.S., authorizing a fiduciary to invest fiduciary funds pursuant to s. 660.417, F.S.; so long as the investment complies with among other things Florida's Prudent Investor Rule. This rule provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.⁴⁶⁵ In seeking to satisfy this standard, the trustee must exercise reasonable care and caution;
- Amended s. 660.417, F.S., regarding investments by fiduciaries, to add that a bank or trust company is not precluded from investing in investment instruments offered by that bank or trust company; and

The bill was then reported favorably with a Committee Substitute.

This analysis is drawn to the Committee Substitute.

CHAMBER ACTION

1 The Civil Justice Committee recommends the following:

2
3 **Council/Committee Substitute**

4 Remove the entire bill and insert:

5 A bill to be entitled

6 An act relating to the Florida Trust Code; creating parts
7 I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII
8 of chapter 736, F.S.; providing a short title; providing
9 general provisions and definitions; providing for judicial
10 proceedings; providing for representations; providing for
11 creation, validity, modification, and termination of
12 trusts; providing for creditors' claims; providing for
13 spendthrift, discretionary, and revocable trusts;
14 providing for the office of trustee; providing for powers
15 and duties of the trustee; providing for trust
16 investments; providing for liability of trustee and rights
17 of persons dealing with trustee; providing for rules of
18 construction; providing for charitable trusts; providing
19 miscellaneous provisions; creating s. 518.117, F.S.;
20 authorizing investment of certain fiduciary funds by
21 certain fiduciaries; amending s. 660.25, F.S.; providing a
22 definition of the term "investment instrument"; amending
23 s. 660.417, F.S.; revising provisions relating to

HB 425

2006
CS

24 investment of fiduciary funds in investment instruments by
25 certain banks or trust companies; creating s. 689.175,
26 F.S.; abolishing the worthier title doctrine; providing
27 construction of certain instrument language; amending s.
28 731.103, F.S.; correcting a cross-reference; providing
29 construction relating to establishment of death by certain
30 evidence under certain circumstances; creating s.
31 731.1035, F.S.; providing for application of rules of
32 evidence in civil actions to certain proceedings; amending
33 s. 731.201, F.S.; revising definitions; conforming terms
34 and correcting cross-references; amending s. 731.303,
35 F.S.; specifying nonapplication of certain orders relating
36 to powers of revocation and powers of appointment;
37 revising provisions relating to representation by a holder
38 of a power of appointment; amending s. 732.513, F.S.;
39 deleting a ground protecting a devise's validity; amending
40 s. 732.603, F.S.; revising provisions relating to
41 antilapse, deceased devisees, and class gifts; amending s.
42 744.331, F.S.; revising provisions relating to orders
43 determining incapacity; amending s. 744.441, F.S.;
44 revising authority of certain guardians to prosecute or
45 defend claims or proceedings for certain purposes;
46 specifying duties of a court; creating s. 744.462, F.S.;
47 providing requirements for judicial determinations
48 relating to alternatives to guardianship; providing duties
49 of a court; amending ss. 497.458, 607.0802, 617.0802,
50 660.46, 660.418, 689.071, 689.075, 709.08, 721.08, 721.53,
51 732.2075, 732.604, 732.611, 733.212, 733.602, 733.805,

HB 425

2006
CS

733.817, 738.104, 738.1041, 738.202, 739.102, and 744.361,
F.S., to conform terms and correct cross-references;
repealing ss. 737.101, 737.105, 737.106, 737.111, 737.115,
and 737.116, constituting part I of ch. 737, F.S.,
relating to trust registration; repealing ss. 737.201,
737.202, 737.203, 737.2035, 737.204, 737.2041, 737.205,
737.206, 737.2065, 737.207, 737.208, and 737.209,
constituting part II of ch. 737, F.S., relating to
jurisdiction of courts; repealing ss. 737.301, 737.302,
737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054,
737.3055, 737.306, 737.3061, 737.307, 737.308, and
737.309, constituting part III of ch. 737, F.S., relating
to duties and liabilities of trustees; repealing ss.
737.401, 737.402, 737.4025, 737.403, 737.4031, 737.4032,
737.4033, 737.404, 737.405, and 737.406, constituting part
IV of ch. 737, F.S., relating to powers of trustees;
repealing ss. 737.501, 737.502, 737.503, 737.504, 737.505,
737.506, 737.507, 737.508, 737.509, 737.510, 737.511, and
737.512, constituting part V of ch. 737, F.S., relating to
charitable trusts; repealing ss. 737.6035, 737.621,
737.622, 737.623, 737.624, 737.625, 737.626, and 737.627,
consisting of part VI of ch. 737, F.S., relating to rules
of construction of trust administration; providing an
effective date.

Be It Enacted by the Legislature of the State of Florida:

HB 425

2006
CS

Section 1. Part I of chapter 736, Florida Statutes, consisting of sections 736.0101, 736.0102, 736.0103, 736.0104, 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110, 736.0111, and 736.0112, is created to read:

PART I

GENERAL PROVISIONS AND DEFINITIONS

736.0101 Short title.--This chapter may be cited as the "Florida Trust Code" and for purposes of this chapter is referred to as the "code."

736.0102 Scope.--This code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust. This code does not apply to constructive or resulting trusts; conservatorships; custodial arrangements pursuant to the Florida Uniform Transfers to Minors Act; business trusts providing for certificates to be issued to beneficiaries; common trust funds; land trusts under s. 689.05; trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another.

736.0103 Definitions.--Unless the context otherwise requires, in this code:

HB 425

2006
CS

(1) "Action," with respect to an act of a trustee,
includes a failure to act.

(2) "Affiliate" means any person or entity that directly
or indirectly through one or more intermediaries owns or
controls, is owned or controlled by, or is under common control
or ownership with, the fiduciary. An affiliate may include, but
is not limited to, an investment adviser, administrator, broker,
custodian, transfer agent, placement agent, servicing agent,
registrar, custodian, underwriter, sponsor, distributor, or
manager.

(3) "Ascertainable standard" means a standard relating to
an individual's health, education, support, or maintenance
within the meaning of s. 2041(b)(1)(A) or s. 2514(c)(1) of the
Internal Revenue Code of 1986, as amended.

(4) "Beneficiary" means a person who:

(a) Has a present or future beneficial interest in a
trust, vested or contingent; or

(b) Holds a power of appointment over trust property in a
capacity other than that of trustee.

(5) "Charitable trust" means a trust, or portion of a
trust, created for a charitable purpose as described in s.
736.0405(1).

(6) "Environmental law" means a federal, state, or local
law, rule, regulation, or ordinance that relates to protection
of the environment or human health.

(7) "General power of appointment" means a power of
appointment exercisable in favor of the holder of the power, the

HB 425

2006
CS

power holder's creditors, the power holder's estate, or the
creditors of the power holder's estate.

(8) "Guardian of the person" means a person appointed by
the court to make decisions regarding the support, care,
education, health, and welfare of a minor or an incapacitated
adult. The term does not include a guardian ad litem.

(9) "Guardian of the property" means a person appointed by
the court to administer the estate of a minor or incapacitated
adult.

(10) "Interests of the beneficiaries" means the beneficial
interests provided in the terms of the trust.

(11) "Jurisdiction" with respect to a geographic area,
includes a state or country.

(12) "Power of withdrawal" means a presently exercisable
general power of appointment other than a power:

(a) Exercisable by a trustee and limited by an
ascertainable standard; or

(b) Exercisable by another person only upon consent of the
trustee or a person holding an adverse interest.

(13) "Property" means anything that may be the subject of
ownership, real or personal, legal or equitable, or any interest
therein.

(14) "Qualified beneficiary" means a living beneficiary
who, on the date the beneficiary's qualification is determined:

(a) Is a distributee or permissible distributee of trust
income or principal;

(b) Would be a distributee or permissible distributee of
trust income or principal if the interests of the distributees

HB 425

2006
CS

described in paragraph (a) terminated on that date without
causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of
trust income or principal if the trust terminated in accordance
with its terms on that date.

(15) "Revocable," as applied to a trust, means revocable
by the settlor without the consent of the trustee or a person
holding an adverse interest.

(16) "Settlor" means a person, including a testator, who
creates or contributes property to a trust. If more than one
person creates or contributes property to a trust, each person
is a settlor of the portion of the trust property attributable
to that person's contribution except to the extent another
person has the power to revoke or withdraw that portion.

(17) "Spendthrift provision" means a term of a trust that
restrains both voluntary and involuntary transfer of a
beneficiary's interest.

(18) "State" means any state of the United States and
includes the District of Columbia, the Commonwealth of Puerto
Rico, and any territory or possession subject to the legislative
authority of the United States.

(19) "Terms of a trust" means the manifestation of the
settlor's intent regarding a trust's provisions as expressed in
the trust instrument or as may be established by other evidence
that would be admissible in a judicial proceeding.

(20) "Trust instrument" means an instrument executed by a
settlor that contains terms of the trust, including any
amendments to the trust.

HB 425

2006
CS

(21) "Trustee" means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee.

736.0104 Knowledge.--

(1) Subject to subsection (2), a person has knowledge of a fact if the person:

(a) Has actual knowledge of the fact;

(b) Has received a notice or notification of the fact; or

(c) Has reason to know the fact from all the other facts and circumstances known to the person at the time in question.

(2) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act on matters involving the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if the organization maintains reasonable routines for communicating significant information to the employee having responsibility to act on matters involving the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

736.0105 Default and mandatory rules.--

(1) Except as otherwise provided in the terms of the trust, this code governs the duties and powers of a trustee,

HB 425

2006
CS

relations among trustees, and the rights and interests of a
beneficiary.

(2) The terms of a trust prevail over any provision of
this code except:

(a) The requirements for creating a trust.

(b) The duty of the trustee to act in good faith and in
accordance with the terms and purposes of the trust and the
interests of the beneficiaries.

(c) The requirement that a trust and its terms be for the
benefit of the trust's beneficiaries, and that the trust have a
purpose that is lawful, not contrary to public policy, and
possible to achieve.

(d) The periods of limitation for commencing a judicial
proceeding.

(e) The power of the court to take such action and
exercise such jurisdiction as may be necessary in the interests
of justice.

(f) The requirements under s. 736.0108(1) for the
designation of a principal place of administration of the trust.

(g) The jurisdiction and venue provisions in ss. 736.0202,
736.0203, and 736.0204.

(h) The restrictions on the designation of representative
under s. 736.0306.

(i) The formalities required under s. 736.0403(2) for the
execution of a trust.

(j) The power of the court to modify or terminate a trust
under ss. 736.0410-736.04115, except as provided in s.
736.04115(3)(b), and under ss. 736.0413, 736.0415, and 736.0416.

HB 425

2006
CS

(k) The ability to modify a trust under s. 736.0412,
except as provided in s. 736.0412(4)(b).

(l) The effect of a spendthrift provision and the rights
of certain creditors and assignees to reach a trust as provided
in part V.

(m) The trustee's duty under s. 736.05053 to pay expenses
and obligations of the settlor's estate.

(n) The trustee's duty under s. 736.05055 to file a notice
of trust at the settlor's death.

(o) The right of a trustee under s. 736.0701 to decline a
trusteeship and the right of a trustee under s. 736.0705 to
resign a trusteeship.

(p) The power of the court under s. 736.0702 to require,
dispense with, modify, or terminate a bond.

(q) The power of the court under s. 736.0708(2) to adjust
a trustee's compensation specified in the terms of the trust
that is unreasonably low or high.

(r) The duty under s. 736.0813(1)(a) and (b) to notify
qualified beneficiaries of an irrevocable trust of the existence
of the trust, of the identity of the trustee, and of their
rights to trust accountings.

(s) The duty under s. 736.0813(1)(c) and (d) to provide a
complete copy of the trust instrument and to account to
qualified beneficiaries.

(t) The duty under s. 736.0813(1)(e) to respond to the
request of a qualified beneficiary of an irrevocable trust for
relevant information about the assets and liabilities of the
trust and the particulars relating to trust administration.

HB 425

2006
CS

273 (u) The effect of an exculpatory term under s. 736.1011.

274 (v) The rights under ss. 736.1013-736.1017 of a person
275 other than a trustee or beneficiary.

276 (w) The effect of a penalty clause for contesting a trust
277 under s. 736.1108.

278 736.0106 Common law of trusts; principles of equity.--The
279 common law of trusts and principles of equity supplement this
280 code, except to the extent modified by this code or another law
281 of this state.

282 736.0107 Governing law.--The meaning and effect of the
283 terms of a trust are determined by:

284 (1) The law of the jurisdiction designated in the terms of
285 the trust, provided there is a sufficient nexus to the
286 designated jurisdiction at the time of the creation of the trust
287 or during the trust administration, including, but not limited
288 to, the location of real property held by the trust or the
289 residence of location of an office of the settlor, trustee, or
290 any beneficiary; or

291 (2) In the absence of a controlling designation in the
292 terms of the trust, the law of the jurisdiction where the
293 settlor resides at the time the trust is first created.

294
295 Notwithstanding subsection (1) or subsection (2), a designation
296 in the terms of a trust is not controlling as to any matter for
297 which the designation would be contrary to a strong public
298 policy of this state.

299 736.0108 Principal place of administration.--

HB 425

2006
CS

(1) Terms of a trust designating the principal place of administration of the trust are valid only if there is a sufficient connection with the designated jurisdiction. Without precluding other means for establishing a sufficient connection, terms of a trust designating the principal place of administration are valid and controlling if:

(a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(b) All or part of the administration occurs in the designated jurisdiction.

(2) Unless otherwise validly designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept or, if the trustee has no place of business, the trustee's residence. In the case of cotrustees, the principal place of administration is:

(a) The usual place of business of the corporate trustee, if there is only one corporate cotrustee;

(b) The usual place of business or residence of the individual trustee who is a professional fiduciary, if there is only one such person and no corporate cotrustee; or otherwise

(c) The usual place of business or residence of any of the cotrustees as agreed on by the cotrustees.

(3) Notwithstanding any other provision of this section, the principal place of administration of a trust, for which a bank, association, or trust company organized under the laws of this state or bank or savings association organized under the laws of the United States with its main office in this state has

HB 425

2006
CS

328 been appointed trustee, shall not be moved or otherwise affected
329 solely because the trustee engaged in an interstate merger
330 transaction with an out-of-state bank pursuant to s. 658.2953 in
331 which the out-of-state bank is the resulting bank.

332 (4) A trustee is under a continuing duty to administer the
333 trust at a place appropriate to its purposes and its
334 administration.

335 (5) Without precluding the right of the court to order,
336 approve, or disapprove a transfer, the trustee, in furtherance
337 of the duty prescribed by subsection (4), may transfer the
338 trust's principal place of administration to another state or to
339 a jurisdiction outside of the United States.

340 (6) The trustee shall notify the qualified beneficiaries
341 of a proposed transfer of a trust's principal place of
342 administration not less than 60 days before initiating the
343 transfer. The notice of proposed transfer must include:

344 (a) The name of the jurisdiction to which the principal
345 place of administration is to be transferred.

346 (b) The address and telephone number at the new location
347 at which the trustee can be contacted.

348 (c) An explanation of the reasons for the proposed
349 transfer.

350 (d) The date on which the proposed transfer is anticipated
351 to occur.

352 (e) The date, not less than 60 days after the notice is
353 provided, by which the qualified beneficiary must notify the
354 trustee of an objection to the proposed transfer.

HB 425

2006
CS

355 (7) The authority of a trustee to act under this section
356 without court approval to transfer a trust's principal place of
357 administration is suspended if a qualified beneficiary files a
358 lawsuit objecting to the proposed transfer on or before the date
359 specified in the notice. The suspension is effective until the
360 lawsuit is dismissed or withdrawn.

361 (8) In connection with a transfer of the trust's principal
362 place of administration, the trustee may transfer any of the
363 trust property to a successor trustee designated in the terms of
364 the trust or appointed pursuant to s. 736.0704.

365 736.0109 Methods and waiver of notice.--

366 (1) Notice to a person under this code or the sending of a
367 document to a person under this code must be accomplished in a
368 manner reasonably suitable under the circumstances and likely to
369 result in receipt of the notice or document. Permissible methods
370 of notice or for sending a document include first-class mail,
371 personal delivery, delivery to the person's last known place of
372 residence or place of business, or a properly directed facsimile
373 or other electronic message.

374 (2) Notice otherwise required under this code or a
375 document otherwise required to be sent under this code need not
376 be provided to a person whose identity or location is unknown to
377 and not reasonably ascertainable by the trustee.

378 (3) Notice under this code or the sending of a document
379 under this code may be waived by the person to be notified or to
380 whom the document is to be sent.

381 (4) Notice of a judicial proceeding must be given as
382 provided in the Florida Rules of Civil Procedure.

HB 425

2006
CS

736.0110 Others treated as qualified beneficiaries.--

(1) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this code if the charitable organization, on the date the charitable organization's qualification is being determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal on termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(2) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in s. 736.0408 or s. 736.0409 has the rights of a qualified beneficiary under this code.

(3) The Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state.

736.0111 Nonjudicial settlement agreements.--

(1) For purposes of this section, the term "interested persons" means persons whose interest would be affected by a settlement agreement.

(2) Except as otherwise provided in subsection (3), interested persons may enter into a binding nonjudicial

HB 425

2006
CS

settlement agreement with respect to any matter involving a trust.

(3) A nonjudicial settlement agreement among the trustee and trust beneficiaries is valid only to the extent the terms and conditions could be properly approved by the court. A nonjudicial settlement may not be used to produce a result not authorized by other provisions of this code, including, but not limited to, terminating or modifying a trust in an impermissible manner.

(4) Matters that may be resolved by a nonjudicial settlement agreement include:

(a) The interpretation or construction of the terms of the trust.

(b) The approval of a trustee's report or accounting.

(c) The direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power.

(d) The resignation or appointment of a trustee and the determination of a trustee's compensation.

(e) The transfer of a trust's principal place of administration.

(f) The liability of a trustee for an action relating to the trust.

(5) Any interested person may request the court to approve or disapprove a nonjudicial settlement agreement.

736.0112 Qualification of foreign trustee.--Unless otherwise doing business in this state, local qualification by a foreign trustee is not required for the trustee to receive

HB 425

2006
CS

distribution from a local estate. Nothing in this chapter shall
affect the provisions of s. 660.41.

Section 2. Part II of chapter 736, Florida Statutes,
consisting of sections 736.0201, 736.0202, 736.0203, 736.0204,
736.0205, 736.0206, and 736.0207, is created to read:

PART II

JUDICIAL PROCEEDINGS

736.0201 Role of court in trust proceedings.--

(1) Except as provided in subsection (5) and s. 736.0206,
proceedings concerning trusts shall be commenced by filing a
complaint and shall be governed by the Florida Rules of Civil
Procedure.

(2) The court may intervene in the administration of a
trust to the extent the court's jurisdiction is invoked by an
interested person or as provided by law.

(3) A trust is not subject to continuing judicial
supervision unless ordered by the court.

(4) A judicial proceeding involving a trust may relate to
the validity, administration, or distribution of a trust,
including proceedings to:

- (a) Determine the validity of all or part of a trust;
- (b) Appoint or remove a trustee;
- (c) Review trustees' fees;
- (d) Review and settle interim or final accounts;
- (e) Ascertain beneficiaries; determine any question
arising in the administration or distribution of any trust,

HB 425

2006
CS

466 including questions of construction of trust instruments;
467 instruct trustees; and determine the existence or nonexistence
468 of any immunity, power, privilege, duty, or right;

469 (f) Obtain a declaration of rights; or
470 (g) Determine any other matters involving trustees and
471 beneficiaries.

472 (5) A proceeding for the construction of a testamentary
473 trust may be filed in the probate proceeding for the testator's
474 estate. The proceeding shall be governed by the Florida Probate
475 Rules.

476 736.0202 Jurisdiction over trustee and beneficiary.--

477 (1) By accepting the trusteeship of a trust having its
478 principal place of administration in this state or by moving the
479 principal place of administration to this state, the trustee
480 submits personally to the jurisdiction of the courts of this
481 state regarding any matter involving the trust.

482 (2) With respect to their interests in the trust, the
483 beneficiaries of a trust having its principal place of
484 administration in this state are subject to the jurisdiction of
485 the courts of this state regarding any matter involving the
486 trust. By accepting a distribution from such a trust, the
487 recipient submits personally to the jurisdiction of the courts
488 of this state regarding any matter involving the distribution.

489 (3) This section does not preclude other methods of
490 obtaining jurisdiction over a trustee, beneficiary, or other
491 person receiving property from the trust.

HB 425

2006
CS

736.0203 Subject-matter jurisdiction.--The circuit court has original jurisdiction in this state of all proceedings arising under this code.

736.0204 Venue.--Venue for actions and proceedings concerning trusts, including those under s. 736.0201, may be laid in:

(1) Any county where the venue is proper under chapter 47;

(2) Any county where the beneficiary suing or being sued resides or has its principal place of business; or

(3) The county where the trust has its principal place of administration.

736.0205 Trust proceedings; dismissal of matters relating to foreign trusts.--Over the objection of a party, the court shall not entertain proceedings under s. 736.0201 for a trust registered, or having its principal place of administration, in another state unless all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state where the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order.

736.0206 Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.--

(1) After notice to all interested persons, the court may review the propriety of the employment by a trustee of any person, including any attorney, auditor, investment adviser, or

HB 425

2006
CS

520 other specialized agent or assistant, and the reasonableness of
521 any compensation paid to that person or to the trustee.

522 (2) If the settlor's estate is being probated, and the
523 settlor's trust or the trustee of the settlor's trust is a
524 beneficiary under the settlor's will, the trustee, any person
525 employed by the trustee, or any interested person may have the
526 propriety of employment and the reasonableness of the
527 compensation of the trustee or any person employed by the
528 trustee determined in the probate proceeding.

529 (3) The burden of proof of the propriety of the employment
530 and the reasonableness of the compensation shall be on the
531 trustee and the person employed by the trustee. Any person who
532 is determined to have received excessive compensation from a
533 trust for services rendered may be ordered to make appropriate
534 refunds.

535 (4) Court proceedings to determine reasonable compensation
536 of a trustee or any person employed by a trustee, if required,
537 are a part of the trust administration process. The costs,
538 including attorney's fees, of the person assuming the burden of
539 proof of propriety of the employment and reasonableness of the
540 compensation shall be determined by the court and paid from the
541 assets of the trust unless the court finds the compensation paid
542 or requested to be substantially unreasonable. The court shall
543 direct from which part of the trust assets the compensation
544 shall be paid.

545 (5) The court may determine reasonable compensation for a
546 trustee or any person employed by a trustee without receiving
547 expert testimony. Any party may offer expert testimony after

HB 425

2006
CS

notice to interested persons. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the trust. The court shall direct from which part of the trust assets the fee shall be paid.

(6) Persons given notice as provided in this section shall be bound by all orders entered on the complaint.

(7) In a proceeding pursuant to subsection (2), the petitioner may serve formal notice as provided in the Florida Probate Rules, and such notice shall be sufficient for the court to acquire jurisdiction over the person receiving the notice to the extent of the person's interest in the trust.

736.0207 Trust contests.--An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable, except this section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Section 3. Part III of chapter 736, Florida Statutes, consisting of sections 736.0301, 736.0302, 736.0303, 736.0304, 736.0305, and 736.0306, is created to read:

PART III
REPRESENTATION

736.0301 Representation; basic effect.--

(1) Notice, information, accountings, or reports given to a person who may represent and bind another person under this part may serve as a substitute for and have the same effect as

HB 425

2006
CS

notice, information, accountings, or reports given directly to
the other person.

(2) Actions taken by a person who represents the interests
of another person under this part are binding on the person
whose interests are represented to the same extent as if the
actions had been taken by the person whose interests are
represented.

(3) Except as otherwise provided in s. 736.0602, a person
under this part who represents a settlor lacking capacity may
receive notice and give a binding consent on the settlor's
behalf.

(4) A trustee is not liable for giving notice,
information, accountings, or reports to a beneficiary who is
represented by another person under this part and nothing in
this part prohibits the trustee from giving notice, information,
accountings, or reports to the person represented.

736.0302 Representation by holder of power of
appointment.--

(1) The holder of a power of appointment may represent and
bind persons whose interests, as permissible appointees, takers
in default, or otherwise, are subject to the power.

(2) Subsection (1) does not apply to:

(a) Any matter determined by the court to involve fraud or
bad faith by the trustee;

(b) A power of a trustee to distribute trust property; or

(c) A power of appointment held by a person while the
person is the sole trustee.

HB 425

2006
CS

736.0303 Representation by fiduciaries and parents.--To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A guardian of the property may represent and bind the estate that the guardian of the property controls.

(2) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.

(3) A trustee may represent and bind the beneficiaries of the trust.

(4) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(5) A parent may represent and bind the parent's unborn child, or the parent's minor child if a guardian of the property for the minor child has not been appointed.

736.0304 Representation by person having substantially identical interest.--Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another person having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

736.0305 Appointment of representative.--

(1) If the court determines that an interest is not represented under this part, or that the otherwise available

HB 425

2006
CS

630 representation might be inadequate, the court may appoint a
631 representative to receive notice, give consent, and otherwise
632 represent, bind, and act on behalf of a minor, incapacitated, or
633 unborn individual, or a person whose identity or location is
634 unknown. If not precluded by a conflict of interest, a
635 representative may be appointed to represent several persons or
636 interests.

637 (2) A representative may act on behalf of the individual
638 represented with respect to any matter arising under this code,
639 whether or not a judicial proceeding concerning the trust is
640 pending.

641 (3) In making decisions, a representative may consider
642 general benefits accruing to the living members of the
643 represented individual's family.

644 736.0306 Designated representative.--

645 (1) If authorized in the trust instrument, one or more
646 persons may be designated to represent and bind a beneficiary
647 and receive any notice, information, accounting, or report.

648 (2) Except as otherwise provided in this code, a person
649 designated, as provided in subsection (1) may not represent and
650 bind a beneficiary while that person is serving as trustee.

651 (3) Except as otherwise provided in this code, a person
652 designated, as provided in subsection (1) may not represent and
653 bind another beneficiary if the person designated also is a
654 beneficiary, unless:

655 (a) That person was named by the settlor; or

HB 425

2006
CS

(b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse.

(4) No person designated, as provided in subsection (1) is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith.

Section 4. Part IV of chapter 736, Florida Statutes, consisting of sections 736.0401, 736.0402, 736.0403, 736.0404, 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410, 736.04113, 736.04115, 736.0412, 736.0413, 736.0414, 736.0415, 736.0416, and 736.0417, is created to read:

PART IV

CREATION, VALIDITY, MODIFICATION, AND TERMINATION

736.0401 Methods of creating trust.--A trust may be created by:

(1) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect on the settlor's death;

(2) Declaration by the owner of property that the owner holds identifiable property as trustee; or

(3) Exercise of a power of appointment in favor of a trustee.

736.0402 Requirements for creation.--

(1) A trust is created only if:

(a) The settlor has capacity to create a trust.

HB 425

2006
CS

684 (b) The settlor indicates an intent to create the trust.
685 (c) The trust has a definite beneficiary or is:
686 1. A charitable trust;
687 2. A trust for the care of an animal, as provided in s.
688 736.0408; or
689 3. A trust for a noncharitable purpose, as provided in s.
690 736.0409.
691 (d) The trustee has duties to perform.
692 (e) The same person is not the sole trustee and sole
693 beneficiary.
694 (2) A beneficiary is definite if the beneficiary can be
695 ascertained now or in the future, subject to any applicable rule
696 against perpetuities.
697 (3) A power of a trustee to select a beneficiary from an
698 indefinite class is valid. If the power is not exercised within
699 a reasonable time, the power fails and the property subject to
700 the power passes to the persons who would have taken the
701 property had the power not been conferred.
702 736.0403 Trusts created in other jurisdictions;
703 formalities required for revocable trusts.--
704 (1) A trust not created by will is validly created if the
705 creation of the trust complies with the law of the jurisdiction
706 in which the trust instrument was executed or the law of the
707 jurisdiction in which, at the time of creation, the settlor was
708 domiciled.
709 (2) Notwithstanding subsection (1):

HB 425

2006
CS

(a) No trust or confidence of or in any messuages, lands, tenements, or hereditaments shall arise or result unless the trust complies with the provisions of s. 689.05.

(b) The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state. For purposes of this subsection, the term "testamentary aspects" means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate.

(3) This section does not apply to trusts established as part of an employee annuity described in s. 403 of the Internal Revenue Code of 1986, as amended, an individual retirement account as described in s. 408 of the Internal Revenue Code of 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other plan that is qualified under s. 401 of the Internal Revenue Code of 1986, as amended.

(4) This section applies to trusts created on or after the effective date of this code. Section 737.111, as in effect prior to the effective date of this code, continues to apply to trusts created before the effective date of this code.

736.0404 Trust purposes.--A trust may be created only to the extent the purposes of the trust are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

736.0405 Charitable purposes; enforcement.--

HB 425

2006
CS

738 (1) A trust may be created for charitable purposes.
739 Charitable purposes include, but are not limited to, the relief
740 of poverty; the advancement of arts, sciences, education, or
741 religion; and the promotion of health, governmental, or
742 municipal purposes.

743 (2) If the terms of a charitable trust do not indicate a
744 particular charitable purpose or beneficiary, the court may
745 select one or more charitable purposes or beneficiaries. The
746 selection must be consistent with the settlor's intent to the
747 extent such intent can be ascertained.

748 (3) The settlor of a charitable trust, among others, has
749 standing to enforce the trust.

750 736.0406 Effect of fraud, duress, mistake, or undue
751 influence.--A trust is void if the creation of the trust is
752 procured by fraud, duress, mistake, or undue influence. Any part
753 of the trust is void if procured by such means, but the
754 remainder of the trust not procured by such means is valid if
755 the remainder is not invalid for other reasons.

756 736.0407 Evidence of oral trust.--Except as required by s.
757 736.0403 or a law other than this code, a trust need not be
758 evidenced by a trust instrument but the creation of an oral
759 trust and its terms may be established only by clear and
760 convincing evidence.

761 736.0408 Trust for care of an animal.--

762 (1) A trust may be created to provide for the care of an
763 animal alive during the settlor's lifetime. The trust terminates
764 on the death of the animal or, if the trust was created to

HB 425

2006
CS

provide for the care of more than one animal alive during the settlor's lifetime, on the death of the last surviving animal.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(3) Property of a trust authorized by this section may be applied only to the intended use of the property, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise as part of the settlor's estate.

736.0409 Noncharitable trust without ascertainable beneficiary.--Except as otherwise provided in s. 736.0408 or by another provision of law, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is appointed, by a person appointed by the court.

HB 425

2006
CS

(3) Property of a trust authorized by this section may be applied only to the intended use of the property, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise as part of the settlor's estate.

736.0410 Modification or termination of trust; proceedings for disapproval of nonjudicial acts.--

(1) In addition to the methods of termination prescribed by ss. 736.04113-736.0414, a trust terminates to the extent the trust expires or is revoked or is properly distributed pursuant to the terms of the trust.

(2) A proceeding to disapprove a proposed modification or termination under s. 736.0412 or a trust combination or division under s. 736.0417 may be commenced by any beneficiary.

(3) A proceeding to disapprove a proposed termination under s. 736.0414(1) may be commenced by any qualified beneficiary.

736.04113 Judicial modification of irrevocable trust when modification is not inconsistent with settlor's purpose.--

(1) Upon the application of a trustee of the trust or any qualified beneficiary, a court at any time may modify the terms of a trust that is not then revocable in the manner provided in subsection (2), if:

HB 425

2006
CS

818 (a) The purposes of the trust have been fulfilled or have
819 become illegal, impossible, wasteful, or impracticable to
820 fulfill;

821 (b) Because of circumstances not anticipated by the
822 settlor, compliance with the terms of the trust would defeat or
823 substantially impair the accomplishment of a material purpose of
824 the trust; or

825 (c) A material purpose of the trust no longer exists.

826 (2) In modifying a trust under this section, a court may:

827 (a) Amend or change the terms of the trust, including
828 terms governing distribution of the trust income or principal or
829 terms governing administration of the trust;

830 (b) Terminate the trust in whole or in part;

831 (c) Direct or permit the trustee to do acts that are not
832 authorized or that are prohibited by the terms of the trust; or

833 (d) Prohibit the trustee from performing acts that are
834 permitted or required by the terms of the trust.

835 (3) In exercising discretion to modify a trust under this
836 section:

837 (a) The court shall consider the terms and purposes of the
838 trust, the facts and circumstances surrounding the creation of
839 the trust, and extrinsic evidence relevant to the proposed
840 modification.

841 (b) The court shall consider spendthrift provisions as a
842 factor in making a decision but the court is not precluded from
843 modifying a trust because the trust contains spendthrift
844 provisions.

HB 425

2006
CS

(4) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

736.04115 Judicial modification of irrevocable trust when modification is in best interest of beneficiaries.--

(1) Without regard to the reasons for modification provided in s. 736.04113, if compliance with the terms of a trust is not in the best interests of the beneficiaries, upon the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable as provided in s. 736.04113(2).

(2) In exercising discretion to modify a trust under this section:

(a) The court shall exercise discretion in a manner that conforms to the extent possible with the intent of the settlor, taking into account the current circumstances and best interests of the beneficiaries.

(b) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.

(c) The court shall consider spendthrift provisions as a factor in making a decision but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.

(3) This section shall not apply to:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if:

HB 425

2006
CS

873 1. Under the terms of the trust, all beneficial interests
874 in the trust must vest or terminate within the period prescribed
875 by the rule against perpetuities in s. 689.225(2),
876 notwithstanding s. 689.225(2)(f).

877 2. The terms of the trust expressly prohibit judicial
878 modification.

879 (4) For purposes of subsection (3), a revocable trust
880 shall be treated as created when the right of revocation
881 terminates.

882 (5) The provisions of this section are in addition to, and
883 not in derogation of, rights under the common law to modify,
884 amend, terminate, or revoke trusts.

885 736.0412 Nonjudicial modification of irrevocable trust.--

886 (1) After the settlor's death, a trust may be modified at
887 any time as provided in s. 736.04113(2) upon the unanimous
888 agreement of the trustee and all qualified beneficiaries.

889 (2) Modification of a trust as authorized in this section
890 is not prohibited by a spendthrift clause or by a provision in
891 the trust instrument that prohibits amendment or revocation of
892 the trust.

893 (3) An agreement to modify a trust under this section is
894 binding on a beneficiary whose interest is represented by
895 another person under part III of this code.

896 (4) This section shall not apply to:

897 (a) Any trust created prior to January 1, 2001.

898 (b) Any trust created after December 31, 2000, if, under
899 the terms of the trust, all beneficial interests in the trust
900 must vest or terminate within the period prescribed by the rule

HB 425

2006
CS

901 against perpetuities in s. 689.225(2), notwithstanding s.
902 689.225(2)(f), unless the terms of the trust expressly authorize
903 nonjudicial modification.

904 (c) Any trust for which a charitable deduction is allowed
905 or allowable under the Internal Revenue Code until the
906 termination of all charitable interests in the trust.

907 (5) For purposes of subsection (4), a revocable trust
908 shall be treated as created when the right of revocation
909 terminates.

910 (6) The provisions of this section are in addition to, and
911 not in derogation of, rights under the common law to modify,
912 amend, terminate, or revoke trusts.

913 736.0413 Cy pres.--

914 (1) If a particular charitable purpose becomes unlawful,
915 impracticable, impossible to achieve, or wasteful, the court may
916 apply the doctrine of cy pres to modify or terminate the trust
917 by directing that the trust property be applied or distributed,
918 in whole or in part, in a manner consistent with the settlor's
919 charitable purposes.

920 (2) A proceeding to modify or terminate a trust under this
921 section may be commenced by a settlor, a trustee, or any
922 qualified beneficiary.

923 736.0414 Modification or termination of uneconomic
924 trust.--

925 (1) After notice to the qualified beneficiaries, the
926 trustee of a trust consisting of trust property having a total
927 value less than \$50,000 may terminate the trust if the trustee

HB 425

2006
CS

concludes that the value of the trust property is insufficient to justify the cost of administration.

(2) Upon application of a trustee or any qualified beneficiary, the court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(3) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. The trustee may enter into agreements or make such other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and the trustee and to carry out the intent and purposes of the trust.

(4) The existence of a spendthrift provision in the trust does not make this section inapplicable unless the trust instrument expressly provides that the trustee may not terminate the trust pursuant to this section.

(5) This section does not apply to an easement for conservation or preservation.

736.0415 Reformation to correct mistakes.--Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor's original intent, the court may

HB 425

2006
CS

956 consider evidence relevant to the settlor's intent even though
957 the evidence contradicts an apparent plain meaning of the trust
958 instrument.

959 736.0416 Modification to achieve settlor's tax
960 objectives.--Upon application of any interested person, to
961 achieve the settlor's tax objectives the court may modify the
962 terms of a trust in a manner that is not contrary to the
963 settlor's probable intent. The court may provide that the
964 modification has retroactive effect.

965 736.0417 Combination and division of trusts.--

966 (1) After notice to the qualified beneficiaries, a trustee
967 may combine two or more trusts into a single trust or divide a
968 trust into two or more separate trusts, if the result does not
969 impair rights of any beneficiary or adversely affect achievement
970 of the purposes of the trusts or trust, respectively.

971 (2) Subject to the terms of the trust, the trustee may
972 take into consideration differences in federal tax attributes
973 and other pertinent factors in administering the trust property
974 of any separate account or trust, in making applicable tax
975 elections, and in making distributions. A separate trust created
976 by severance must be treated as a separate trust for all
977 purposes from the date on which the severance is effective. The
978 effective date of the severance may be retroactive to a date
979 before the date on which the trustee exercises such power.

980 Section 5. Part V of chapter 736, Florida Statutes,
981 consisting of sections 736.0501, 736.0502, 736.0503, 736.0504,
982 736.0505, 736.05053, 736.05055, 736.0506, and 736.0507, is
983 created to read:

HB 425

2006
CS

PART V

CREDITORS' CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

736.0501 Rights of beneficiary's creditor or assignee.--To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means. The court may limit the award to such relief as is appropriate under the circumstances.

736.0502 Spendthrift provision.--

(1) A spendthrift provision is valid only if the provision restrains both voluntary and involuntary transfer of a beneficiary's interest. This subsection does not apply to any trust in existence on the effective date of this code.

(2) A term of a trust providing that the interest of a beneficiary is held subject to a spendthrift trust, or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(3) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this part, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt of the interest or distribution by the beneficiary.

HB 425

2006
CS

(4) A valid spendthrift provision does not prevent the appointment of interests through the exercise of a power of appointment.

736.0503 Exceptions to spendthrift provision.--

(1) As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or any other state.

(2) To the extent provided in subsection (3), a spendthrift provision is unenforceable against:

(a) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.

(b) A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust.

(c) A claim of this state or the United States to the extent a law of this state or a federal law so provides.

(3) Except as otherwise provided in this subsection, a claimant against which a spendthrift provision may not be enforced may obtain from a court, or pursuant to the Uniform Interstate Family Support Act, an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. Notwithstanding this subsection, the remedies provided in this subsection apply to a claim by a beneficiary's child, spouse, former spouse, or a judgment creditor described in paragraph (2)(a) or paragraph (2)(b) only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient.

HB 425

2006
CS

736.0504 Discretionary trusts; effect of standard.--

(1) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

(a) The discretion is expressed in the form of a standard of distribution; or

(b) The trustee has abused the discretion.

(2) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.

(3) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

736.0505 Creditors' claims against settlor.--

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.

(b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more

HB 425

2006
CS

than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(2) For purposes of this section:

(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.

(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in:

1. Section 2041(b) (2) or s. 2514(e); or

2. Section 2503(b),

of the Internal Revenue Code of 1986, as amended.

736.05053 Trustee's duty to pay expenses and obligations of settlor's estate.--

(1) A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a trustee, unless otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the provisions of this subsection;

HB 425

2006
CS

1095 however, the payments must be made from assets, property, or the
1096 proceeds of the assets or property, other than assets proscribed
1097 in s. 733.707(3), that are included in the settlor's gross
1098 estate for federal estate tax purposes.

1099 (2) Unless a settlor provides by will, or designates in a
1100 trust described in s. 733.707(3) funds or property passing under
1101 the trust to be used as designated, the expenses of the
1102 administration and obligations of the settlor's estate must be
1103 paid from the trust in the following order:

1104 (a) Property of the residue of the trust remaining after
1105 all distributions that are to be satisfied by reference to a
1106 specific property or type of property, fund, or sum.

1107 (b) Property that is not to be distributed from specified
1108 or identified property or a specified or identified item of
1109 property.

1110 (c) Property that is to be distributed from specified or
1111 identified property or a specified or identified item of
1112 property.

1113 (3) Trust distributions that are to be satisfied from
1114 specified or identified property must be classed as
1115 distributions to be satisfied from the general assets of the
1116 trust and not otherwise disposed of in the trust instrument on
1117 the failure or insufficiency of funds or property from which
1118 payment should be made, to the extent of the insufficiency.
1119 Trust distributions given for valuable consideration abate with
1120 other distributions of the same class only to the extent of the
1121 excess over the value of the consideration until all others of
1122 the same class are exhausted. Except as provided in this

HB 425

2006
CS

section, trust distributions abate equally and ratably and
without preference or priority between real and personal
property. When a specified or identified item of property that
has been designated for distribution in the trust instrument or
that is charged with a distribution is sold or taken by the
trustee, other beneficiaries shall contribute according to their
respective interests to the beneficiary whose property has been
sold or taken. Before distribution, the trustee shall determine
the amounts of the respective contributions and such amounts
must be paid or withheld before distribution is made.

(4) The trustee shall pay the expenses of trust
administration, including compensation of trustees and attorneys
of the trustees, before and in preference to the expenses of the
administration and obligations of the settlor's estate.

736.05055 Notice of trust.--

(1) Upon the death of a settlor of a trust described in s.
733.707(3), the trustee must file a notice of trust with the
court of the county of the settlor's domicile and the court
having jurisdiction of the settlor's estate.

(2) The notice of trust must contain the name of the
settlor, the settlor's date of death, the title of the trust, if
any, the date of the trust, and the name and address of the
trustee.

(3) If the settlor's probate proceeding has been
commenced, the clerk shall notify the trustee in writing of the
date of the commencement of the probate proceeding and the file
number.

HB 425

2006
CS

(4) The clerk shall file and index the notice of trust in the same manner as a caveat unless there exists a probate proceeding for the settlor's estate, in which case the notice of trust must be filed in the probate proceeding and the clerk shall send a copy to the personal representative.

(5) The clerk shall send a copy of any caveat filed regarding the settlor to the trustee, and the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same.

(6) Any proceeding affecting the expenses of the administration or obligations of the settlor's estate prior to the trustee filing a notice of trust are binding on the trustee.

(7) The trustee's failure to file the notice of trust does not affect the trustee's obligation to pay expenses of administration and obligations of the settlor's estate as provided in s. 733.607(2).

736.0506 Overdue distribution.--

(1) As used in this section, the term "mandatory distribution" means a distribution of income or principal the trustee is required to make to a beneficiary under the terms of the trust, including a distribution on termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if:

(a) The discretion is expressed in the form of a standard of distribution; or

(b) The terms of the trust authorizing a distribution couple language of discretion with language of direction.

HB 425

2006
CS

(2) A creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date, whether or not a trust contains a spendthrift provision.

736.0507 Personal obligations of trustee.--Except to the extent of the trustee's interest in the trust other than as a trustee, trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

Section 6. Part VI of chapter 736, Florida Statutes, consisting of sections 736.0601, 736.0602, 736.0603, and 736.0604, is created to read:

PART VI
REVOCABLE TRUSTS

736.0601 Capacity of settlor of revocable trust.--The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

736.0602 Revocation or amendment of revocable trust.--

(1) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before the effective date of this code.

HB 425

2006
CS

1204 (2) If a revocable trust is created or funded by more than
1205 one settlor:

1206 (a) To the extent the trust consists of community
1207 property, the trust may be revoked by either spouse acting alone
1208 but may be amended only by joint action of both spouses.

1209 (b) To the extent the trust consists of property other
1210 than community property, each settlor may revoke or amend the
1211 trust with regard to the portion of the trust property
1212 attributable to that settlor's contribution.

1213 (c) Upon the revocation or amendment of the trust by fewer
1214 than all of the settlors, the trustee shall promptly notify the
1215 other settlors of the revocation or amendment.

1216 (3) Subject to s. 736.0403(2), the settlor may revoke or
1217 amend a revocable trust:

1218 (a) By substantial compliance with a method provided in
1219 the terms of the trust; or

1220 (b) If the terms of the trust do not provide a method, by:
1221 1. A later will or codicil that expressly refers to the
1222 trust or specifically devises property that would otherwise have
1223 passed according to the terms of the trust; or

1224 2. Any other method manifesting clear and convincing
1225 evidence of the settlor's intent.

1226 (4) Upon revocation of a revocable trust, the trustee
1227 shall deliver the trust property as the settlor directs.

1228 (5) A settlor's powers with respect to revocation,
1229 amendment, or distribution of trust property may be exercised by
1230 an agent under a power of attorney only as authorized by s.
1231 709.08.

HB 425

2006
CS

(6) A guardian of the property of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only as provided in s. 744.441.

(7) A trustee who does not know that a trust has been revoked or amended is not liable for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

736.0603 Settlor's powers; powers of withdrawal.--

(1) While a trust is revocable, the duties of the trustee are owed exclusively to the settlor.

(2) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

736.0604 Limitation on action contesting validity of revocable trust.--An action to contest the validity of a trust that was revocable at the settlor's death is barred, if not commenced within the earlier of:

(1) The time as provided in chapter 95; or

(2) Six months after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

Section 7. Part VII of chapter 736, Florida Statutes, consisting of sections 736.0701, 736.0702, 736.0703, 736.0704, 736.0705, 736.0706, 736.0707, 736.0708, and 736.0709, is created to read:

HB 425

2006
CS

PART VII

OFFICE OF TRUSTEE

736.0701 Accepting or declining trusteeship.--

(1) Except as otherwise provided in subsection (3), a person designated as trustee accepts the trusteeship:

(a) By substantially complying with a method of acceptance provided in the terms of the trust; or

(b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(2) A person designated as trustee who has not accepted the trusteeship may decline the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have declined the trusteeship.

(3) A person designated as trustee may, without accepting the trusteeship:

(a) Act to preserve the trust property if, within a reasonable time after acting, the person sends to a qualified beneficiary a written statement declining the trusteeship.

(b) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

736.0702 Trustee's bond.--

HB 425

2006
CS

(1) A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(2) The court may specify the amount of a bond, the trustee's liabilities under the bond, and whether sureties are necessary. The court may modify or terminate a bond at any time.

736.0703 Cotrustees.--

(1) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(2) If a vacancy occurs in a cotrusteeship, the remaining cotrustees or a majority of the remaining cotrustees may act for the trust.

(3) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other provision of law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another cotrustee.

(4) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(5) A cotrustee may not delegate to another cotrustee the performance of a function the settlor reasonably expected the

HB 425

2006
CS

1315 cotrustees to perform jointly. A cotrustee may revoke a
1316 delegation previously made.

1317 (6) Except as otherwise provided in subsection (7), a
1318 cotrustee who does not join in an action of another cotrustee is
1319 not liable for the action.

1320 (7) Each cotrustee shall exercise reasonable care to:

1321 (a) Prevent a cotrustee from committing a breach of trust.

1322 (b) Compel a cotrustee to redress a breach of trust.

1323 (8) A dissenting cotrustee who joins in an action at the
1324 direction of the majority of the cotrustees and who notifies any
1325 cotrustee of the dissent at or before the time of the action is
1326 not liable for the action.

1327 736.0704 Vacancy in trusteeship; appointment of
1328 successor.--

1329 (1) A vacancy in a trusteeship occurs if:

1330 (a) A person designated as trustee declines the
1331 trusteeship;

1332 (b) A person designated as trustee cannot be identified or
1333 does not exist;

1334 (c) A trustee resigns;

1335 (d) A trustee is disqualified or removed;

1336 (e) A trustee dies; or

1337 (f) A trustee is adjudicated to be incapacitated.

1338 (2) If one or more cotrustees remain in office, a vacancy
1339 in a trusteeship need not be filled. A vacancy in a trusteeship
1340 must be filled if the trust has no remaining trustee.

HB 425

2006
CS

(3) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(a) By a person named or designated pursuant to the terms of the trust to act as successor trustee.

(b) By a person appointed by unanimous agreement of the qualified beneficiaries.

(c) By a person appointed by the court.

(4) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

(a) By a person named or designated pursuant to the terms of the trust to act as successor trustee.

(b) By a person selected by unanimous agreement of the charitable organizations expressly designated to receive distributions under the terms of the trust.

(c) By a person appointed by the court.

(5) The court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust, whether or not a vacancy in a trusteeship exists or is required to be filled.

736.0705 Resignation of trustee.--

(1) A trustee may resign:

(a) Upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

(b) With the approval of the court.

HB 425

2006
CS

(2) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(3) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

736.0706 Removal of trustee.--

(1) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee or a trustee may be removed by the court on the court's own initiative.

(2) The court may remove a trustee if:

(a) The trustee has committed a serious breach of trust;

(b) The lack of cooperation among cotrustees substantially impairs the administration of the trust;

(c) Due to the unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(d) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(3) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under s. 736.1001(2) as

HB 425

2006
CS

1395 may be necessary to protect the trust property or the interests
1396 of the beneficiaries.

1397 736.0707 Delivery of property by former trustee.--

1398 (1) Unless a cotrustee remains in office or the court
1399 otherwise orders and until the trust property is delivered to a
1400 successor trustee or other person entitled to the property, a
1401 trustee who has resigned or been removed has the duties of a
1402 trustee and the powers necessary to protect the trust property.

1403 (2) A trustee who has resigned or been removed shall
1404 within a reasonable time deliver the trust property within the
1405 trustee's possession to the cotrustee, successor trustee, or
1406 other person entitled to the property, subject to the right of
1407 the trustee to retain a reasonable reserve for the payment of
1408 debts, expenses, and taxes. The provisions of this subsection
1409 are in addition to and are not in derogation of the rights of a
1410 removed or resigning trustee under the common law.

1411 736.0708 Compensation of trustee.--

1412 (1) If the terms of a trust do not specify the trustee's
1413 compensation, a trustee is entitled to compensation that is
1414 reasonable under the circumstances.

1415 (2) If the terms of a trust specify the trustee's
1416 compensation, the trustee is entitled to be compensated as
1417 specified but the court may allow more or less compensation if:

1418 (a) The duties of the trustee are substantially different
1419 from those contemplated when the trust was created; or

1420 (b) The compensation specified by the terms of the trust
1421 would be unreasonably low or high.

HB 425

2006
CS

(3) If the trustee has rendered other services in connection with the administration of the trust, the trustee shall also be allowed reasonable compensation for the other services rendered in addition to reasonable compensation as trustee.

736.0709 Reimbursement of expenses.--

(1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for reasonable expenses that were properly incurred in the administration of the trust.

(2) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Section 8. Part VIII of chapter 736, Florida Statutes, consisting of sections 736.0801, 736.0802, 736.0803, 736.0804, 736.0805, 736.0806, 736.0807, 736.0808, 736.0809, 736.0810, 736.08105, 736.0811, 736.0812, 736.08125, 736.0813, 736.08135, 736.0814, 736.08147, 736.0815, 736.0816, 736.08163, 736.08165, and 736.0817, is created to read:

PART VIII

DUTIES AND POWERS OF TRUSTEE

736.0801 Duty to administer trust.--Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this code.

HB 425

2006
CS

1450 736.0802 Duty of loyalty.--

1451 (1) As between a trustee and the beneficiaries, a trustee
1452 shall administer the trust solely in the interests of the
1453 beneficiaries.

1454 (2) Subject to the rights of persons dealing with or
1455 assisting the trustee as provided in s. 736.1016, a sale,
1456 encumbrance, or other transaction involving the investment or
1457 management of trust property entered into by the trustee for the
1458 trustee's own personal account or which is otherwise affected by
1459 a conflict between the trustee's fiduciary and personal
1460 interests is voidable by a beneficiary affected by the
1461 transaction unless:

1462 (a) The transaction was authorized by the terms of the
1463 trust;

1464 (b) The transaction was approved by the court;

1465 (c) The beneficiary did not commence a judicial proceeding
1466 within the time allowed by s. 736.1008;

1467 (d) The beneficiary consented to the trustee's conduct,
1468 ratified the transaction, or released the trustee in compliance
1469 with s. 736.1012;

1470 (e) The transaction involves a contract entered into or
1471 claim acquired by the trustee when that person had not become or
1472 contemplated becoming trustee; or

1473 (f) The transaction was consented to in writing by a
1474 settlor of the trust while the trust was revocable.

1475 (3) A sale, encumbrance, or other transaction involving
1476 the investment or management of trust property is presumed to be
1477 affected by a conflict between personal and fiduciary interests

HB 425

2006
CS

1478 if the sale, encumbrance, or other transaction is entered into
 1479 by the trustee with:
 1480 (a) The trustee's spouse;
 1481 (b) The trustee's descendants, siblings, parents, or their
 1482 spouses;
 1483 (c) An officer, director, employee, agent, or attorney of
 1484 the trustee; or
 1485 (d) A corporation or other person or enterprise in which
 1486 the trustee, or a person that owns a significant interest in the
 1487 trustee, has an interest that might affect the trustee's best
 1488 judgment.
 1489 (4) A transaction not concerning trust property in which
 1490 the trustee engages in the trustee's individual capacity
 1491 involves a conflict between personal and fiduciary interests if
 1492 the transaction concerns an opportunity properly belonging to
 1493 the trust.
 1494 (5) (a) An investment by a trustee authorized by lawful
 1495 authority to engage in trust business, as defined in s.
 1496 658.12(20), in investment instruments, as defined in s.
 1497 660.25(6), that are owned or controlled by the trustee or its
 1498 affiliate, or from which the trustee or its affiliate receives
 1499 compensation for providing services in a capacity other than as
 1500 trustee, is not presumed to be affected by a conflict between
 1501 personal and fiduciary interests provided the investment
 1502 otherwise complies with chapters 518 and 660 and the trustee
 1503 complies with the disclosure requirements of this subsection.
 1504 (b) A trustee who invests trust funds in investment
 1505 instruments that are owned or controlled by the trustee or its

HB 425

2006
CS

affiliate shall disclose the following to all qualified
beneficiaries:

1. Notice that the trustee has invested trust funds in
investment instruments owned or controlled by the trustee or its
affiliate.

2. The identity of the investment instruments.

3. The identity and relationship to the trustee of any
affiliate that owns or controls the investment instruments.

(c) A trustee who invests trust funds in investment
instruments with respect to which the trustee or its affiliate
receives compensation for providing services in a capacity other
than as trustee shall disclose to all qualified beneficiaries,
all compensation, including, but not limited to, fees or
commissions, paid or to be paid by the account and received or
to be received by an affiliate arising from such affiliated
investment.

(d) Disclosure required by this subsection shall be made
at least annually unless there has been no change in the method
or increase in the rate at which such compensation is calculated
since the most recent disclosure. The disclosure may be given in
a trust disclosure document as defined in s. 736.1008, in a copy
of the prospectus for the investment instrument, in any other
written disclosure prepared for the investment instrument under
applicable federal or state law, or in a written summary that
includes all compensation received or to be received by the
trustee and any affiliate of the trustee and an explanation of
the manner in which such compensation is calculated, either as a
percentage of the assets invested or by some other method.

HB 425

2006
CS

(e) This subsection shall apply as follows:

1. This subsection does not apply to qualified investment instruments or to a trust for which a right of revocation exists.

2. For investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created on or after July 1, 2007, the assets of which are valued in excess of \$5 million on the date the trust is created.

3. For investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts not described in subparagraph 2. only as follows:

a. Such paragraphs shall not apply until 60 days after the statement required in paragraph (f) is provided and no objection is made or any objection which is made has been terminated.

(I) An objection is made if, within 60 days after the date of the statement required in paragraph (f), a super majority of the eligible beneficiaries deliver to the trustee written objections to the application of this subsection to such trust. An objection shall be deemed to be delivered to the trustee on the date the objection is mailed to the mailing address listed in the notice provided in paragraph (f).

(II) An objection is terminated upon the earlier of the receipt of consent from a super majority of eligible beneficiaries of the class that made the objection or the resolution of the objection pursuant to this subparagraph.

HB 425

2006
CS

(III) If an objection is delivered to the trustee, the trustee may petition the court for an order overruling the objection and authorizing the trustee to make investments under this subsection. The burden shall be on the trustee to show good cause for the relief sought.

(IV) Any qualified beneficiary may petition the court for an order to prohibit, limit, or restrict a trustee's authority to make investments under this subsection. The burden shall be upon the petitioning beneficiary to show good cause for the relief sought.

(V) The court may award costs and attorney's fees relating to any petition under this subparagraph in the same manner as in chancery actions. When costs and attorney's fees are to be paid out of the trust, the court, in its discretion, may direct from which part of the trust such costs and fees shall be paid.

b. The objection of a super majority of eligible beneficiaries under this subparagraph may thereafter be removed by the written consent of a super majority of the class or classes of those eligible beneficiaries that made the objection.

(f)1. Any time prior to initially investing in any investment instrument described in this subsection other than a qualified investment instrument, the trustee of a trust described in subparagraph (e)3. shall provide to all qualified beneficiaries a statement containing the following:

a. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information.

HB 425

2006
CS

b. A statement that, unless a super majority of the eligible beneficiaries objects to the application of this subsection to the trust within 60 days after the date the statement pursuant to this subsection was delivered, this subsection shall apply to the trust.

c. A statement that, if this subsection applies to the trust, the trustee will have the right to make investments in investment instruments, as defined in s. 658.12(20), that are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, and that the trustee or its affiliate may receive fees in addition to the trustee's compensation for administering the trust.

A statement by the trustee is not delivered if the statement is accompanied by another written communication other than a written communication by the trustee that refers only to the statement.

2. For purposes of paragraph (e) and this paragraph:

a. "Eligible beneficiaries" means:

(I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (c); or

(II) If there is no beneficiary described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (b).

b. "Super majority of the eligible beneficiaries" means:

HB 425

2006
CS

(I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(14)(c), at least two-thirds in interest of the beneficiaries described in s. 736.0103(14)(a) or two-thirds in interest of the beneficiaries described in s. 736.0103(14)(c), if the interests of the beneficiaries are reasonably ascertainable; otherwise, two-thirds in number of either such class; or

(II) If there is no beneficiary as described in s. 736.0103(14)(c), at least two-thirds in interest of the beneficiaries described in s. 736.0103(14)(a) or two-thirds in interest of the beneficiaries described in s. 736.0103(14)(b), if the interests of the beneficiaries are reasonably ascertainable; otherwise, two-thirds in number of either such class.

c. "Qualified investment instrument" means a mutual fund, common trust fund, or money market fund described in and governed by s. 736.0816(3).

d. An irrevocable trust is created upon execution of the trust instrument. If a trust that was revocable when created thereafter becomes irrevocable, the irrevocable trust is created when the right of revocation terminates.

(6) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

HB 425

2006
CS

(7) This section does not preclude the following transactions, if fair to the beneficiaries:

(a) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(b) A payment of reasonable compensation to the trustee;

(c) A transaction between a trust and another trust, the decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;

(d) A deposit of trust money in a regulated financial-service institution operated by the trustee; or

(e) An advance by the trustee of money for the protection of the trust.

(8) This section does not preclude the employment of persons, including, but not limited to, attorneys, accountants, investment advisers, or agents, even if they are the trustee, an affiliate of the trustee, or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and to pay reasonable compensation and costs incurred in connection with such employment from the assets of the trust; to act without independent investigation on their recommendations; and, instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

(9) The court may appoint a special fiduciary to act with respect to any proposed transaction that might violate this section if entered into by the trustee.

HB 425

2006
CS

1670 (10) Payment of costs or attorney's fees incurred in any
1671 trust proceeding from the assets of the trust may be made by the
1672 trustee without the approval of any person and without court
1673 authorization, except that court authorization shall be required
1674 if an action has been filed or defense asserted against the
1675 trustee based upon a breach of trust. Court authorization is not
1676 required if the action or defense is later withdrawn or
1677 dismissed by the party that is alleging a breach of trust or
1678 resolved without a determination by the court that the trustee
1679 has committed a breach of trust.

1680 736.0803 Impartiality.--If a trust has two or more
1681 beneficiaries, the trustee shall act impartially in
1682 administering the trust property, giving due regard to the
1683 beneficiaries' respective interests.

1684 736.0804 Prudent administration.--A trustee shall
1685 administer the trust as a prudent person would, by considering
1686 the purposes, terms, distribution requirements, and other
1687 circumstances of the trust. In satisfying this standard, the
1688 trustee shall exercise reasonable care, skill, and caution.

1689 736.0805 Expenses of administration.--In administering a
1690 trust, the trustee shall only incur expenses that are reasonable
1691 in relation to the trust property, the purposes of the trust,
1692 and the skills of the trustee.

1693 736.0806 Trustee's skills.--A trustee who has special
1694 skills or expertise, or is named trustee in reliance on the
1695 trustee's representation that the trustee has special skills or
1696 expertise, shall use those special skills or expertise.

1697 736.0807 Delegation by trustee.--

HB 425

2006
CS

(1) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(a) Selecting an agent.

(b) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.

(c) Reviewing the agent's actions periodically, in order to monitor the agent's performance and compliance with the terms of the delegation.

(2) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(3) A trustee who complies with subsection (1) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(4) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

736.0808 Powers to direct.--

(1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable.

(2) If the terms of a trust confer on a person other than the settlor of a revocable trust, the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee

HB 425

2006
CS

1726 knows the attempted exercise would constitute a serious breach
1727 of a fiduciary duty that the person holding the power owes to
1728 the beneficiaries of the trust.

1729 (3) The terms of a trust may confer on a trustee or other
1730 person a power to direct the modification or termination of the
1731 trust.

1732 (4) A person, other than a beneficiary, who holds a power
1733 to direct is presumptively a fiduciary who, as such, is required
1734 to act in good faith with regard to the purposes of the trust
1735 and the interests of the beneficiaries. The holder of a power to
1736 direct is liable for any loss that results from breach of a
1737 fiduciary duty.

1738 736.0809 Control and protection of trust property.--A
1739 trustee shall take reasonable steps to take control of and
1740 protect the trust property.

1741 736.0810 Recordkeeping and identification of trust
1742 property.--

1743 (1) A trustee shall keep clear, distinct, and accurate
1744 records of the administration of the trust.

1745 (2) A trustee shall keep trust property separate from the
1746 trustee's own property.

1747 (3) Except as otherwise provided in subsection (4), a
1748 trustee shall cause the trust property to be designated so that
1749 the interest of the trust, to the extent feasible, appears in
1750 records maintained by a party other than a trustee or
1751 beneficiary.

HB 425

2006
CS

1752 (4) If the trustee maintains records clearly indicating
1753 the respective interests, a trustee may invest as a whole the
1754 property of two or more separate trusts.

1755 736.08105 Duty to ascertain marketable title of trust real
1756 property.--A trustee holding title to real property received
1757 from a settlor or estate shall not be required to obtain title
1758 insurance or proof of marketable title until a marketable title
1759 is required for a sale or conveyance of the real property.

1760 736.0811 Enforcement and defense of claims.--A trustee
1761 shall take reasonable steps to enforce claims of the trust and
1762 to defend claims against the trust.

1763 736.0812 Collecting trust property.--A trustee shall take
1764 reasonable steps to compel a former trustee or other person to
1765 deliver trust property to the trustee and, except as provided in
1766 s. 736.08125, to redress a breach of trust known to the trustee
1767 to have been committed by a former trustee.

1768 736.08125 Protection of successor trustees.--

1769 (1) A successor trustee is not personally liable for
1770 actions taken by any prior trustee, nor does any successor
1771 trustee have a duty to institute any proceeding against any
1772 prior trustee, or file any claim against any prior trustee's
1773 estate, for any of the prior trustee's actions as trustee under
1774 any of the following circumstances:

1775 (a) As to a successor trustee who succeeds a trustee who
1776 was also the settlor of a trust that was revocable during the
1777 time that the settlor served as trustee;

HB 425

2006
CS

1778 (b) As to any beneficiary who has waived any accounting
1779 required by s. 736.0813, but only as to the periods included in
1780 the waiver;

1781 (c) As to any beneficiary who has released the successor
1782 trustee from the duty to institute any proceeding or file any
1783 claim;

1784 (d) As to any person who is not an eligible beneficiary;
1785 or

1786 (e) As to any eligible beneficiary:

1787 1. If a supermajority of the eligible beneficiaries have
1788 released the successor trustee;

1789 2. If the eligible beneficiary has not delivered a written
1790 request to the successor trustee to institute an action or file
1791 a claim against the prior trustee within 6 months after the date
1792 of the successor trustee's acceptance of the trust, if the
1793 successor trustee has notified the eligible beneficiary in
1794 writing of acceptance by the successor trustee in accordance
1795 with 736.0813(1)(a) and that writing advises the beneficiary
1796 that, unless the beneficiary delivers the written request within
1797 6 months after the date of acceptance, the right to proceed
1798 against the successor trustee will be barred pursuant to this
1799 section; or

1800 3. For any action or claim that the eligible beneficiary
1801 is barred from bringing against the prior trustee.

1802 (2) For the purposes of this section, the term:

1803 (a) "Eligible beneficiaries" means:

HB 425

2006
CS

1. At the time the determination is made, if there are one or more beneficiaries as described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (c); or

2. If there is no beneficiary as described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (b).

(b) "Supermajority of eligible beneficiaries" means at least two-thirds in interest of the eligible beneficiaries if the interests of the eligible beneficiaries are reasonably ascertainable, otherwise, at least two-thirds in number of the eligible beneficiaries.

(3) Nothing in this section affects any liability of the prior trustee or the right of the successor trustee or any beneficiary to pursue an action or claim against the prior trustee.

736.0813 Duty to inform and account.--The trustee shall keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration.

(1) The trustee's duty to inform and account includes, but is not limited to, the following:

(a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust and the full name and address of the trustee.

(b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or

HB 425

2006
CS

otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, and the right to accountings under this section.

(c) Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument.

(d) A trustee of an irrevocable trust shall provide a trust accounting, as set forth in s. 736.08135, to each qualified beneficiary annually and on termination of the trust or on change of the trustee.

(e) Upon reasonable request, the trustee shall provide a qualified beneficiary with relevant information about the assets and liabilities of the trust and the particulars relating to administration.

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

(2) A qualified beneficiary may waive the trustee's duty to account under paragraph (1)(d). A qualified beneficiary may withdraw a waiver previously given. Waivers and withdrawals of prior waivers under this subsection must be in writing. Withdrawals of prior waivers are effective only with respect to accountings for future periods.

HB 425

2006
CS

(3) The representation provisions of part III apply with respect to all rights of a qualified beneficiary under this section.

(4) As provided in s. 736.0603(1), the trustee's duties under this section extend only to the settlor while a trust is revocable.

(5) This section applies to trust accountings rendered for accounting periods beginning on or after January 1, 2008.

736.08135 Trust accountings.--

(1) A trust accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date on which the trustee became accountable, that adequately discloses the information required in subsection (2).

(2)(a) The accounting must begin with a statement identifying the trust, the trustee furnishing the accounting, and the time period covered by the accounting.

(b) The accounting must show all cash and property transactions and all significant transactions affecting administration during the accounting period, including compensation paid to the trustee and the trustee's agents. Gains and losses realized during the accounting period and all receipts and disbursements must be shown.

(c) To the extent feasible, the accounting must identify and value trust assets on hand at the close of the accounting period. For each asset or class of assets reasonably capable of valuation, the accounting shall contain two values, the asset acquisition value or carrying value and the estimated current value. The accounting must identify each known noncontingent

HB 425

2006
CS

1887 liability with an estimated current amount of the liability if
1888 known.

1889 (d) To the extent feasible, the accounting must show
1890 significant transactions that do not affect the amount for which
1891 the trustee is accountable, including name changes in investment
1892 holdings, adjustments to carrying value, a change of custodial
1893 institutions, and stock splits.

1894 (e) The accounting must reflect the allocation of
1895 receipts, disbursements, accruals, or allowances between income
1896 and principal when the allocation affects the interest of any
1897 beneficiary of the trust.

1898 (f) The trustee shall include in the final accounting a
1899 plan of distribution for any undistributed assets shown on the
1900 final accounting.

1901 (3) This section applies to all trust accountings rendered
1902 for any accounting periods beginning on or after January 1,
1903 2003.

1904 736.0814 Discretionary powers; tax savings.--

1905 (1) Notwithstanding the breadth of discretion granted to a
1906 trustee in the terms of the trust, including the use of such
1907 terms as "absolute," "sole," or "uncontrolled," the trustee
1908 shall exercise a discretionary power in good faith and in
1909 accordance with the terms and purposes of the trust and the
1910 interests of the beneficiaries. A court shall not determine that
1911 a trustee abused its discretion merely because the court would
1912 have exercised the discretion in a different manner or would not
1913 have exercised the discretion.

HB 425

2006
CS

(2) Subject to subsection (3) and unless the terms of the trust expressly indicate that a rule in this subsection does not apply, a person who is a beneficiary and a trustee may not:

(a) Make discretionary distributions of either principal or income to or for the benefit of that trustee, other than distributions subject to an ascertainable standard;

(b) Make discretionary allocations of receipts or expenses as between principal and income, unless the trustee acts in a fiduciary capacity whereby the trustee has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of the trustee's fiduciary duties;

(c) Make discretionary distributions of either principal or income to satisfy any of the trustee's legal support obligations; or

(d) Exercise any other power, including, but not limited to, the right to remove or to replace any trustee, so as to cause the powers enumerated in paragraph (a), paragraph (b), or paragraph (c) to be exercised on behalf of, or for the benefit of, a beneficiary who is also a trustee.

(3) Subsection (2) does not apply to:

(a) A power held by the settlor of the trust;

(b) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in s. 2056(a) or s. 2523(a) of the Internal Revenue Code of 1986, as amended, was previously allowed;

(c) Any trust during any period that the trust may be revoked or amended by its settlor; or

HB 425

2006
CS

(d) A trust if contributions to the trust qualify for the annual exclusion under s. 2503(c) of the Internal Revenue Code of 1986, as amended.

(4) A power whose exercise is limited or prohibited by subsection (2) may be exercised by the remaining trustees whose exercise of the power is not so limited or prohibited. If there is no trustee qualified to exercise the power, on petition by any qualified beneficiary, the court may appoint an independent trustee with authority to exercise the power.

(5) A person who has the right to remove or to replace a trustee does not possess nor may that person be deemed to possess, by virtue of having that right, the powers of the trustee that is subject to removal or to replacement.

736.08147 Duty to distribute trust income.--If a will or trust instrument granting income to the settlor's or testator's spouse for life is silent as to the time of distribution of income and the frequency of distributions, the trustee shall distribute all net income, as defined in chapter 738, to the spouse no less frequently than annually. This provision shall apply to any trust established before, on, or after July 1, 2007, unless the trust instrument expressly directs or permits net income to be distributed less frequently than annually.

736.0815 General powers of trustee.--

(1) A trustee, without authorization by the court, may, except as limited or restricted by this code, exercise:

(a) Powers conferred by the terms of the trust.

(b) Except as limited by the terms of the trust:

HB 425

2006
CS

1968 1. All powers over the trust property that an unmarried
1969 competent owner has over individually owned property.

1970 2. Any other powers appropriate to achieve the proper
1971 investment, management, and distribution of the trust property.

1972 3. Any other powers conferred by this code.

1973 (2) The exercise of a power is subject to the fiduciary
1974 duties prescribed by this code.

1975 736.0816 Specific powers of trustee.--Except as limited or
1976 restricted by this code, a trustee may:

1977 (1) Collect trust property and accept or reject additions
1978 to the trust property from a settlor, including an asset in
1979 which the trustee is personally interested, and hold property in
1980 the name of a nominee or in other form without disclosure of the
1981 trust so that title to the property may pass by delivery but the
1982 trustee is liable for any act of the nominee in connection with
1983 the property so held.

1984 (2) Acquire or sell property, for cash or on credit, at
1985 public or private sale.

1986 (3) Acquire an undivided interest in a trust asset,
1987 including, but not limited to, a money market mutual fund,
1988 mutual fund, or common trust fund, in which asset the trustee
1989 holds an undivided interest in any trust capacity, including any
1990 money market or other mutual fund from which the trustee or any
1991 affiliate or associate of the trustee is entitled to receive
1992 reasonable compensation for providing necessary services as an
1993 investment adviser, portfolio manager, or servicing agent. A
1994 trustee or affiliate or associate of the trustee may receive
1995 compensation for such services in addition to fees received for

HB 425

2006
CS

1996 administering the trust provided such compensation is fully
 1997 disclosed in writing to all qualified beneficiaries.
 1998 (4) Exchange, partition, or otherwise change the character
 1999 of trust property.
 2000 (5) Deposit trust money in an account in a regulated
 2001 financial-service institution.
 2002 (6) Borrow money, with or without security, and mortgage
 2003 or pledge trust property for a period within or extending beyond
 2004 the duration of the trust and advance money for the protection
 2005 of the trust.
 2006 (7) With respect to an interest in a proprietorship,
 2007 partnership, limited liability company, business trust,
 2008 corporation, or other form of business or enterprise, continue
 2009 the business or other enterprise and take any action that may be
 2010 taken by shareholders, members, or property owners, including,
 2011 but not limited to, merging, dissolving, or otherwise changing
 2012 the form of business organization or contributing additional
 2013 capital.
 2014 (8) With respect to stocks or other securities, exercise
 2015 the rights of an absolute owner, including, but not limited to,
 2016 the right to:
 2017 (a) Vote, or give proxies to vote, with or without power
 2018 of substitution, or enter into or continue a voting trust
 2019 agreement.
 2020 (b) Hold a security in the name of a nominee or in other
 2021 form without disclosure of the trust so that title may pass by
 2022 delivery.

HB 425

2006
CS

2023 (c) Pay calls, assessments, and other sums chargeable or
2024 accruing against the securities, and sell or exercise stock
2025 subscription or conversion rights.

2026 (d) Deposit the securities with a depository or other
2027 regulated financial-service institution.

2028 (9) With respect to an interest in real property,
2029 construct, or make ordinary or extraordinary repairs to,
2030 alterations to, or improvements in, buildings or other
2031 structures, demolish improvements, raze existing or erect new
2032 party walls or buildings, subdivide or develop land, dedicate
2033 land to public use or grant public or private easements, and
2034 make or vacate plats and adjust boundaries.

2035 (10) Enter into a lease for any purpose as lessor or
2036 lessee, including a lease or other arrangement for exploration
2037 and removal of natural resources, with or without the option to
2038 purchase or renew, for a period within or extending beyond the
2039 duration of the trust.

2040 (11) Grant an option involving a sale, lease, or other
2041 disposition of trust property or acquire an option for the
2042 acquisition of property, including an option exercisable beyond
2043 the duration of the trust, and exercise an option so acquired.

2044 (12) Insure the property of the trust against damage or
2045 loss and insure the trustee, trustee's agents, and beneficiaries
2046 against liability arising from the administration of the trust.

2047 (13) Abandon or decline to administer property of no value
2048 or of insufficient value to justify the collection or continued
2049 administration of such property.

HB 425

2006
CS

2050 (14) Pay or contest any claim, settle a claim by or
2051 against the trust, and release, in whole or in part, a claim
2052 belonging to the trust.

2053 (15) Pay taxes, assessments, compensation of the trustee
2054 and of employees and agents of the trust, and other expenses
2055 incurred in the administration of the trust.

2056 (16) Allocate items of income or expense to trust income
2057 or principal, as provided by law.

2058 (17) Exercise elections with respect to federal, state,
2059 and local taxes.

2060 (18) Select a mode of payment under any employee benefit
2061 or retirement plan, annuity, or life insurance payable to the
2062 trustee, exercise rights under such plan, annuity, or insurance,
2063 including exercise of the right to indemnification for expenses
2064 and against liabilities, and take appropriate action to collect
2065 the proceeds.

2066 (19) Make loans out of trust property, including, but not
2067 limited to, loans to a beneficiary on terms and conditions that
2068 are fair and reasonable under the circumstances, and the trustee
2069 has a lien on future distributions for repayment of those loans.

2070 (20) Employ persons, including, but not limited to,
2071 attorneys, accountants, investment advisers, or agents, even if
2072 they are the trustee, an affiliate of the trustee, or otherwise
2073 associated with the trustee, to advise or assist the trustee in
2074 the exercise of any of the trustee's powers and pay reasonable
2075 compensation and costs incurred in connection with such
2076 employment from the assets of the trust and act without

HB 425

2006
CS

2077 independent investigation on the recommendations of such
2078 persons.

2079 (21) Pay an amount distributable to a beneficiary who is
2080 under a legal disability or who the trustee reasonably believes
2081 is incapacitated, by paying the amount directly to the
2082 beneficiary or applying the amount for the beneficiary's
2083 benefit, or by:

2084 (a) Paying the amount to the beneficiary's guardian of the
2085 property or, if the beneficiary does not have a guardian of the
2086 property, the beneficiary's guardian of the person;

2087 (b) Paying the amount to the beneficiary's custodian under
2088 a Uniform Transfers to Minors Act or custodial trustee under a
2089 Uniform Custodial Trust Act, and, for that purpose, creating a
2090 custodianship or custodial trust;

2091 (c) Paying the amount to an adult relative or other person
2092 having legal or physical care or custody of the beneficiary, to
2093 be expended on the beneficiary's behalf, if the trustee does not
2094 know of a guardian of the property, guardian of the person,
2095 custodian, or custodial trustee; or

2096 (d) Managing the amount as a separate fund on the
2097 beneficiary's behalf, subject to the beneficiary's continuing
2098 right to withdraw the distribution.

2099 (22) On distribution of trust property or the division or
2100 termination of a trust, make distributions in divided or
2101 undivided interests, allocate particular assets in proportionate
2102 or disproportionate shares, value the trust property for those
2103 purposes, and adjust for resulting differences in valuation.

HB 425

2006
CS

2104 (23) Prosecute or defend, including appeals, an action,
2105 claim, or judicial proceeding in any jurisdiction to protect
2106 trust property or the trustee in the performance of the
2107 trustee's duties.

2108 (24) Sign and deliver contracts and other instruments that
2109 are useful to achieve or facilitate the exercise of the
2110 trustee's powers.

2111 (25) On termination of the trust, exercise the powers
2112 appropriate to wind up the administration of the trust and
2113 distribute the trust property to the persons entitled to the
2114 property, subject to the right of the trustee to retain a
2115 reasonable reserve for the payment of debts, expenses, and
2116 taxes.

2117 736.08163 Powers of trustees relating to environmental or
2118 human health laws or to trust property contaminated with
2119 hazardous or toxic substances; liability.--

2120 (1) From the creation of a trust until final distribution
2121 of the assets from the trust, the trustee has, without court
2122 authorization, the powers specified in subsection (2).

2123 (2) Unless otherwise provided in the trust instrument, a
2124 trustee has the power, acting reasonably, to:

2125 (a) Inspect or investigate, or cause to be inspected or
2126 investigated, property held by the trustee, including interests
2127 in sole proprietorships, partnerships, or corporations and any
2128 assets owned by any such business entity for the purpose of
2129 determining compliance with an environmental law affecting that
2130 property or to respond to an actual or threatened violation of
2131 an environmental law affecting that property;

HB 425

2006
CS

2132 (b) Take, on behalf of the trust, any action necessary to
2133 prevent, abate, or otherwise remedy an actual or potential
2134 violation of an environmental law affecting property held by the
2135 trustee, before or after initiation of an enforcement action by
2136 a governmental body;

2137 (c) Refuse to accept property in trust if the trustee
2138 determines that any property to be donated or conveyed to the
2139 trustee is contaminated with a hazardous substance or is being
2140 used or has been used for an activity directly or indirectly
2141 involving a hazardous substance, which circumstance could result
2142 in liability to the trust or trustee or otherwise impair the
2143 value of the assets to be held;

2144 (d) Settle or compromise at any time any claim against the
2145 trust or trustee that may be asserted by a governmental body or
2146 private party that involves the alleged violation of an
2147 environmental law affecting property of any trust over which the
2148 trustee has responsibility;

2149 (e) Disclaim any power granted by any document, law, or
2150 rule of law that, in the sole judgment of the trustee, may cause
2151 the trustee to incur personal liability, or the trust to incur
2152 liability, under any environmental law;

2153 (f) Decline to serve as a trustee, or having undertaken to
2154 serve as a trustee, resign at any time, if the trustee believes
2155 there is or may be a conflict of interest in its fiduciary
2156 capacity and in its individual capacity because of potential
2157 claims or liabilities that may be asserted against the trustee
2158 on behalf of the trust by reason of the type or condition of the
2159 assets held; or

HB 425

2006
CS

2160 (g) Charge against the income and principal of the trust
2161 the cost of any inspection, investigation, review, abatement,
2162 response, cleanup, or remedial action that this section
2163 authorizes the trustee to take and, if the trust terminates or
2164 closes or the trust property is transferred to another trustee,
2165 hold assets sufficient to cover the cost of cleaning up any
2166 known environmental problem.

2167 (3) A trustee is not personally liable to any beneficiary
2168 or any other person for a decrease in value of assets in a trust
2169 by reason of the trustee's compliance or efforts to comply with
2170 an environmental law, specifically including any reporting
2171 requirement under that law.

2172 (4) A trustee that acquires ownership or control of a
2173 vessel or other property, without having owned, operated, or
2174 materially participated in the management of that vessel or
2175 property before assuming ownership or control as trustee, is not
2176 considered an owner or operator for purposes of liability under
2177 chapter 376, chapter 403, or any other environmental law. A
2178 trustee that willfully, knowingly, or recklessly causes or
2179 exacerbates a release or threatened release of a hazardous
2180 substance is personally liable for the cost of the response, to
2181 the extent that the release or threatened release is
2182 attributable to the trustee's activities. This subsection does
2183 not preclude the filing of claims against the assets that
2184 constitute the trust held by the trustee or the filing of
2185 actions against the trustee in its representative capacity and
2186 in any such action, an award or judgment against the trustee
2187 must be satisfied only from the assets of the trust.

HB 425

2006
CS

(5) The acceptance by the trustee of the property or a failure by the trustee to inspect or investigate the property does not create any inference as to whether there is liability under an environmental law with respect to that property.

(6) For the purposes of this section, the term "hazardous substance" means a substance defined as hazardous or toxic, or any contaminant, pollutant, or constituent thereof, or otherwise regulated, by an environmental law.

(7) This section does not apply to any trust created under a document executed before July 1, 1995, unless the trust is amendable and the settlor amends the trust at any time to incorporate the provisions of this section.

736.08165 Administration pending outcome of contest or other proceeding.--

(1) Pending the outcome of a proceeding filed to determine the validity of all or part of a trust or the beneficiaries of all or part of a trust, the trustee shall proceed with the administration of the trust as if no proceeding had been commenced, except no action may be taken and no distribution may be made to a beneficiary in contravention of the rights of those persons who may be affected by the outcome of the proceeding.

(2) Upon motion of a party and after notice to interested persons, a court, on good cause shown, may make an exception to the prohibition under subsection (1) and authorize the trustee to act or to distribute trust assets to a beneficiary subject to any conditions the court, in the court's discretion, may impose, including the posting of bond by the beneficiary.

HB 425

2006
CS

736.0817 Distribution on termination.--Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to the property, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes. The provisions of this section are in addition to and are not in derogation of the rights of a trustee under the common law with respect to final distribution of a trust.

Section 9. Part IX of chapter 736, Florida Statutes, consisting of section 736.0901, is created to read:

PART IX
TRUST INVESTMENTS

736.0901 Applicability of chapter 518.--A trustee shall invest trust property in accordance with chapter 518.

Section 10. Part X of chapter 736, Florida Statutes, consisting of sections 736.1001, 736.1002, 736.1003, 736.1004, 736.1005, 736.1006, 736.1007, 736.1008, 736.1009, 736.1010, 736.1011, 736.1012, 736.1013, 736.1014, 736.1015, 736.1016, 736.1017, and 736.1018, is created to read:

PART X
LIABILITY OF TRUSTEE AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

736.1001 Remedies for breach of trust.--

HB 425

2006
CS

2242 (1) A violation by a trustee of a duty the trustee owes to
2243 a beneficiary is a breach of trust.

2244 (2) To remedy a breach of trust that has occurred or may
2245 occur, the court may:

2246 (a) Compel the trustee to perform the trustee's duties;
2247 (b) Enjoin the trustee from committing a breach of trust;
2248 (c) Compel the trustee to redress a breach of trust by
2249 paying money or restoring property or by other means;

2250 (d) Order a trustee to account;
2251 (e) Appoint a special fiduciary to take possession of the
2252 trust property and administer the trust;

2253 (f) Suspend the trustee;
2254 (g) Remove the trustee as provided in s. 736.706;
2255 (h) Reduce or deny compensation to the trustee;
2256 (i) Subject to s. 736.1016, void an act of the trustee,
2257 impose a lien or a constructive trust on trust property, or
2258 trace trust property wrongfully disposed of and recover the
2259 property or its proceeds; or

2260 (j) Order any other appropriate relief.

2261 (3) As an illustration of the remedies available to the
2262 court and without limiting the court's discretion as provided in
2263 subsection (2), if a breach of trust results in the favoring of
2264 any beneficiary to the detriment of any other beneficiary or
2265 consists of an abuse of the trustee's discretion:

2266 (a) To the extent the breach of trust has resulted in no
2267 distribution to a beneficiary or a distribution that is too
2268 small, the court may require the trustee to pay from the trust
2269 to the beneficiary an amount the court determines will restore

HB 425

2006
CS

2270 the beneficiary, in whole or in part, to his or her appropriate
2271 position.

2272 (b) To the extent the breach of trust has resulted in a
2273 distribution to a beneficiary that is too large, the court may
2274 restore the beneficiaries, the trust, or both, in whole or in
2275 part, to their appropriate positions by requiring the trustee to
2276 withhold an amount from one or more future distributions to the
2277 beneficiary who received the distribution that was too large or
2278 by requiring that beneficiary to return some or all of the
2279 distribution to the trust.

2280 736.1002 Damages for breach of trust.--

2281 (1) A trustee who commits a breach of trust is liable for
2282 the greater of:

2283 (a) The amount required to restore the value of the trust
2284 property and trust distributions to what they would have been if
2285 the breach had not occurred, including lost income, capital
2286 gain, or appreciation that would have resulted from proper
2287 administration; or

2288 (b) The profit the trustee made by reason of the breach.

2289 (2) Except as otherwise provided in this subsection, if
2290 more than one person, including a trustee or trustees, is liable
2291 to the beneficiaries for a breach of trust, each liable person
2292 is entitled to pro rata contribution from the other person or
2293 persons. A person is not entitled to contribution if the person
2294 committed the breach of trust in bad faith. A person who
2295 received a benefit from the breach of trust is not entitled to
2296 contribution from another person to the extent of the benefit
2297 received.

HB 425

2006
CS

(3) In determining the pro rata shares of liable persons in the entire liability for a breach of trust:

(a) Their relative degrees of fault shall be the basis for allocation of liability.

(b) If equity requires, the collective liability of some as a group shall constitute a single share.

(c) Principles of equity applicable to contribution generally shall apply.

(4) The right of contribution shall be enforced as follows:

(a) Contribution may be enforced by separate action, whether or not judgment has been entered in an action against two or more liable persons for the same breach of trust.

(b) When a judgment has been entered in an action against two or more liable persons for the same breach of trust, contribution may be enforced in that action by judgment in favor of one judgment defendant against any other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for breach of trust against the liable person seeking contribution, any separate action by that person to enforce contribution must be commenced within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the breach of trust against the liable person seeking contribution, the person's right of contribution is barred unless the person has:

1. Discharged by payment the common liability within the period of the statute of limitations applicable to the

HB 425

2006
CS

2326 beneficiary's right of action against the liable person and the
2327 person has commenced an action for contribution within 1 year
2328 after payment, or

2329 2. Agreed, while action is pending against the liable
2330 person, to discharge the common liability and has within 1 year
2331 after the agreement paid the liability and commenced the
2332 person's action for contribution.

2333 (5) The beneficiary's recovery of a judgment for breach of
2334 trust against one liable person does not of itself discharge
2335 other liable persons from liability for the breach of trust
2336 unless the judgment is satisfied. The satisfaction of the
2337 judgment does not impair any right of contribution.

2338 (6) The judgment of the court in determining the liability
2339 of several defendants to the beneficiary for breach of trust is
2340 binding upon such defendants in determining the right of such
2341 defendants to contribution.

2342 (7) Subsection (2) applies to all causes of action for
2343 breach of trust pending on July 1, 2007, under which causes of
2344 action the right of contribution among persons jointly and
2345 severally liable is involved and to all causes of action filed
2346 after July 1, 2007.

2347 736.1003 Damages in absence of breach.--Absent a breach of
2348 trust, a trustee is not liable to a beneficiary for a loss or
2349 depreciation in the value of trust property or for not having
2350 made a profit.

2351 736.1004 Attorney's fees and costs.--

HB 425

2006
CS

2352 (1) (a) In all actions for breach of fiduciary duty or
2353 challenging the exercise of, or failure to exercise, a trustee's
2354 powers; and

2355 (b) In proceedings arising under ss. 736.0410-736.0417,
2356
2357 the court shall award taxable costs as in chancery actions,
2358 including attorney fees and guardian ad litem fees.

2359 (2) When awarding taxable costs under this section,
2360 including attorney fees and guardian ad litem fees, the court,
2361 in its discretion, may direct payment from a party's interest,
2362 if any, in the trust or enter a judgment that may be satisfied
2363 from other property of the party, or both.

2364 736.1005 Attorney's fees for services to the trust.--

2365 (1) Any attorney who has rendered services to a trust may
2366 be awarded reasonable compensation from the trust. The attorney
2367 may apply to the court for an order awarding attorney's fees
2368 and, after notice and service on the trustee and all
2369 beneficiaries entitled to an accounting under s. 736.0813, the
2370 court shall enter an order on the fee application.

2371 (2) Whenever attorney's fees are to be paid out of the
2372 trust, the court, in its discretion, may direct from what part
2373 of the trust the fees shall be paid.

2374 (3) Except when a trustee's interest may be adverse in a
2375 particular matter, the attorney shall give reasonable notice in
2376 writing to the trustee of the attorney's retention by an
2377 interested person and the attorney's entitlement to fees
2378 pursuant to this section. A court may reduce any fee award for
2379 services rendered by the attorney prior to the date of actual

HB 425

2006
CS

2380 notice to the trustee, if the actual notice date is later than a
2381 date of reasonable notice. In exercising this discretion, the
2382 court may exclude compensation for services rendered after the
2383 reasonable notice date but prior to the date of actual notice.

2384 736.1006 Costs in trust proceedings.--

2385 (1) In all trust proceedings, costs may be awarded as in
2386 chancery actions.

2387 (2) Whenever costs are to be paid out of the trust, the
2388 court, in its discretion, may direct from what part of the trust
2389 the costs shall be paid.

2390 736.1007 Trustee's attorney's fees.--

2391 (1) If the trustee of a revocable trust retains an
2392 attorney to render legal services in connection with the initial
2393 administration of the trust, the attorney is entitled to
2394 reasonable compensation for those legal services, payable from
2395 the assets of the trust without court order. The trustee and the
2396 attorney may agree to compensation that is determined in a
2397 manner or amount other than the manner or amount provided in
2398 this section. The agreement is not binding on a person who bears
2399 the impact of the compensation unless that person is a party to
2400 or otherwise consents to be bound by the agreement. The
2401 agreement may provide that the trustee is not individually
2402 liable for the attorney's fees and costs.

2403 (2) Unless otherwise agreed, compensation based on the
2404 value of the trust assets immediately following the settlor's
2405 death and the income earned by the trust during initial
2406 administration at the rate of 75 percent of the schedule
2407 provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable

HB 425

2006
CS

2408 total compensation for ordinary services of all attorneys
2409 employed generally to advise a trustee concerning the trustee's
2410 duties in initial trust administration.

2411 (3) An attorney who is retained to render only limited and
2412 specifically defined legal services shall be compensated as
2413 provided in the retaining agreement. If the amount or method of
2414 determining compensation is not provided in the agreement, the
2415 attorney is entitled to a reasonable fee, taking into account
2416 the factors set forth in subsection (6).

2417 (4) Ordinary services of the attorney in an initial trust
2418 administration include legal advice and representation
2419 concerning the trustee's duties relating to:

2420 (a) Review of the trust instrument and each amendment for
2421 legal sufficiency and interpretation.

2422 (b) Implementation of substitution of the successor
2423 trustee.

2424 (c) Persons who must or should be served with required
2425 notices and the method and timing of such service.

2426 (d) The obligation of a successor to require a former
2427 trustee to provide an accounting.

2428 (e) The trustee's duty to protect, insure, and manage
2429 trust assets and the trustee's liability relating to these
2430 duties.

2431 (f) The trustee's duty regarding investments imposed by
2432 the prudent investor rule.

2433 (g) The trustee's obligation to inform and account to
2434 beneficiaries and the method of satisfaction of such
2435 obligations, the liability of the trust and trustee to the

HB 425

2006
CS

2436 settlor's creditors, and the advisability or necessity for
2437 probate proceedings to bar creditors.

2438 (h) Contributions due to the personal representative of
2439 the settlor's estate for payment of expenses of administration
2440 and obligations of the settlor's estate.

2441 (i) Identifying tax returns required to be filed by the
2442 trustee, the trustee's liability for payment of taxes, and the
2443 due date of returns.

2444 (j) Filing a nontaxable affidavit, if not filed by a
2445 personal representative.

2446 (k) Order of payment of expenses of administration of the
2447 trust and order and priority of abatement of trust
2448 distributions.

2449 (l) Distribution of income or principal to beneficiaries
2450 or funding of further trusts provided in the governing
2451 instrument.

2452 (m) Preparation of any legal documents required to effect
2453 distribution.

2454 (n) Fiduciary duties, avoidance of self-dealing, conflicts
2455 of interest, duty of impartiality, and obligations to
2456 beneficiaries.

2457 (o) If there is a conflict of interest between a trustee
2458 who is a beneficiary and other beneficiaries of the trust,
2459 advice to the trustee on limitations of certain authority of the
2460 trustee regarding discretionary distributions or exercise of
2461 certain powers and alternatives for appointment of an
2462 independent trustee and appropriate procedures.

HB 425

2006
CS

(p) Procedures for the trustee's discharge from liability for administration of the trust on termination or resignation.

(5) In addition to the attorney's fees for ordinary services, the attorney for the trustee shall be allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size of the trust. Extraordinary services may include, but are not limited to:

(a) Involvement in a trust contest, trust construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceedings, apportionment of estate taxes, or other adversary proceedings or litigation by or against the trust.

(b) Representation of the trustee in an audit or any proceeding for adjustment, determination, or collection of any taxes.

(c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 303 and 6166 privileges, deduction of last illness expenses, distribution planning, asset basis considerations, throwback rules, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release from personal liability for payment of tax.

HB 425

2006
CS

2491 (d) Review of an estate tax return and preparation or
2492 review of other tax returns required to be filed by the trustee.
2493 (e) Preparation of decedent's federal estate tax return.
2494 If this return is prepared by the attorney, a fee of one-half of
2495 1 percent up to a value of \$10 million and one-fourth of 1
2496 percent on the value in excess of \$10 million, of the gross
2497 estate as finally determined for federal estate tax purposes, is
2498 presumed to be reasonable compensation for the attorney for this
2499 service. These fees shall include services for routine audit of
2500 the return, not beyond the examining agent level, if required.
2501 (f) Purchase, sale, lease, or encumbrance of real property
2502 by the trustee or involvement in zoning, land use,
2503 environmental, or other similar matters.
2504 (g) Legal advice regarding carrying on of decedent's
2505 business or conducting other commercial activity by the trustee.
2506 (h) Legal advice regarding claims for damage to the
2507 environment or related procedures.
2508 (i) Legal advice regarding homestead status of trust real
2509 property or proceedings involving the status.
2510 (j) Involvement in fiduciary, employee, or attorney
2511 compensation disputes.
2512 (k) Considerations of special valuation of trust assets,
2513 including discounts for blockage, minority interests, lack of
2514 marketability, and environmental liability.
2515 (6) Upon petition of any interested person in a proceeding
2516 to review the compensation paid or to be paid to the attorney
2517 for the trustee, the court may increase or decrease the
2518 compensation for ordinary services of the attorney for the

HB 425

2006
CS

2519 trustee or award compensation for extraordinary services if the
2520 facts and circumstances of the particular administration
2521 warrant. In determining reasonable compensation, the court shall
2522 consider all of the following factors giving such weight to each
2523 as the court may determine to be appropriate:

2524 (a) The promptness, efficiency, and skill with which the
2525 initial administration was handled by the attorney.

2526 (b) The responsibilities assumed by, and potential
2527 liabilities of, the attorney.

2528 (c) The nature and value of the assets that are affected
2529 by the decedent's death.

2530 (d) The benefits or detriments resulting to the trust or
2531 the trust's beneficiaries from the attorney's services.

2532 (e) The complexity or simplicity of the administration and
2533 the novelty of issues presented.

2534 (f) The attorney's participation in tax planning for the
2535 estate, the trust, and the trust's beneficiaries and tax return
2536 preparation or review and approval.

2537 (g) The nature of the trust assets, the expenses of
2538 administration, and the claims payable by the trust and the
2539 compensation paid to other professionals and fiduciaries.

2540 (h) Any delay in payment of the compensation after the
2541 services were furnished.

2542 (i) Any other relevant factors.

2543 (7) The court may determine reasonable attorney's
2544 compensation without receiving expert testimony. Any party may
2545 offer expert testimony after notice to interested persons. If
2546 expert testimony is offered, an expert witness fee may be

HB 425

2006
CS

2547 awarded by the court and paid from the assets of the trust. The
2548 court shall direct from what part of the trust the fee is to be
2549 paid.

2550 (8) If a separate written agreement regarding compensation
2551 exists between the attorney and the settlor, the attorney shall
2552 furnish a copy to the trustee prior to commencement of
2553 employment and, if employed, shall promptly file and serve a
2554 copy on all interested persons. A separate agreement or a
2555 provision in the trust suggesting or directing the trustee to
2556 retain a specific attorney does not obligate the trustee to
2557 employ the attorney or obligate the attorney to accept the
2558 representation but, if the attorney who is a party to the
2559 agreement or who drafted the trust is employed, the compensation
2560 paid shall not exceed the compensation provided in the
2561 agreement.

2562 (9) Court proceedings to determine compensation, if
2563 required, are a part of the trust administration process and the
2564 costs, including fees for the trustee's attorney, shall be
2565 determined by the court and paid from the assets of the trust
2566 unless the court finds the attorney's fees request to be
2567 substantially unreasonable. The court shall direct from what
2568 part of the trust the fees are to be paid.

2569 (10) As used in this section, the term "initial trust
2570 administration" means administration of a revocable trust during
2571 the period that begins with the death of the settlor and ends on
2572 the final distribution of trust assets outright or to continuing
2573 trusts created under the trust agreement but, if an estate tax
2574 return is required, not until after issuance of an estate tax

HB 425

2006
CS

2575 closing letter or other evidence of termination of the estate
2576 tax proceeding. This initial period is not intended to include
2577 continued regular administration of the trust.

2578 736.1008 Limitations on proceedings against trustees.--

2579 (1) Except as provided in subsection (2), all claims by a
2580 beneficiary against a trustee for breach of trust are barred as
2581 provided in chapter 95 as to:

2582 (a) All matters adequately disclosed in a trust disclosure
2583 document issued by the trustee, with the limitations period
2584 beginning on the date of receipt of adequate disclosure.

2585 (b) All matters not adequately disclosed in a trust
2586 disclosure document if the trustee has issued a final trust
2587 accounting and has given written notice to the beneficiary of
2588 the availability of the trust records for examination and that
2589 any claims with respect to matters not adequately disclosed may
2590 be barred unless an action is commenced within the applicable
2591 limitations period provided in chapter 95. The limitations
2592 period begins on the date of receipt of the final trust
2593 accounting and notice.

2594 (2) Unless sooner barred by adjudication, consent, or
2595 limitations, a beneficiary is barred from bringing an action
2596 against a trustee for breach of trust with respect to a matter
2597 that was adequately disclosed in a trust disclosure document
2598 unless a proceeding to assert the claim is commenced within 6
2599 months after receipt from the trustee of the trust disclosure
2600 document or a limitation notice that applies to that disclosure
2601 document, whichever is received later.

HB 425

2006
CS

(3) When a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document accrues when the beneficiary has actual knowledge of the trustee's repudiation of the trust or adverse possession of trust assets, and is barred as provided in chapter 95.

(4) As used in this section, the term:

(a) "Trust disclosure document" means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.

(b) "Trust accounting" means an accounting that adequately discloses the information required by and that substantially complies with the standards set forth in s. 736.08135.

(c) "Limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may but is not required to be in the following form: "An action for breach of trust based on matters disclosed in a trust

HB 425

2006
CS

2630 accounting or other written report of the trustee may be subject
2631 to a 6-month statute of limitations from the receipt of the
2632 trust accounting or other written report. If you have questions,
2633 please consult your attorney."

2634 (5) For purposes of this section, a limitation notice
2635 applies to a trust disclosure document when the limitation
2636 notice is:

2637 (a) Contained as a part of the trust disclosure document
2638 or as a part of another trust disclosure document received
2639 within 1 year prior to the receipt of the latter trust
2640 disclosure document;

2641 (b) Accompanied concurrently by the trust disclosure
2642 document or by another trust disclosure document that was
2643 received within 1 year prior to the receipt of the latter trust
2644 disclosure document;

2645 (c) Delivered separately within 10 days after the delivery
2646 of the trust disclosure document or of another trust disclosure
2647 document that was received within 1 year prior to the receipt of
2648 the latter trust disclosure document. For purposes of this
2649 paragraph, a limitation notice is not delivered separately if
2650 the notice is accompanied by another written communication,
2651 other than a written communication that refers only to the
2652 limitation notice; or

2653 (d) Received more than 10 days after the delivery of the
2654 trust disclosure document but only if the limitation notice
2655 references that trust disclosure document and:

2656 1. Offers to provide to the beneficiary on request another
2657 copy of that trust disclosure document if the document was

HB 425

2006
CS

received by the beneficiary within 1 year prior to receipt of
the limitation notice; or

2. Is accompanied by another copy of that trust disclosure
document if the trust disclosure document was received by the
beneficiary 1 year or more prior to the receipt of the
limitation notice.

(6) This section applies to trust accountings for
accounting periods beginning on or after January 1, 2008, and to
written reports, other than trust accountings, received by a
beneficiary on or after January 1, 2008.

736.1009 Reliance on trust instrument.--A trustee who acts
in reasonable reliance on the terms of the trust as expressed in
the trust instrument is not liable to a beneficiary for a breach
of trust to the extent the breach resulted from the reliance.

736.1010 Event affecting administration or
distribution.--If the happening of an event, including marriage,
divorce, performance of educational requirements, or death,
affects the administration or distribution of a trust, a trustee
who has exercised reasonable care to ascertain the happening of
the event is not liable for a loss resulting from the trustee's
lack of knowledge.

736.1011 Exculpation of trustee.--

(1) A term of a trust relieving a trustee of liability for
breach of trust is unenforceable to the extent that the term:

(a) Relieves the trustee of liability for breach of trust
committed in bad faith or with reckless indifference to the
purposes of the trust or the interests of the beneficiaries; or

HB 425

2006
CS

(b) Was inserted into the trust instrument as the result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor.

(2) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that the term's existence and contents were adequately communicated directly to the settlor.

736.1012 Beneficiary's consent, release, or ratification.--A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

736.1013 Limitation on personal liability of trustee.--

(1) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

(2) A trustee is personally liable for torts committed in the course of administering a trust or for obligations arising

HB 425

2006
CS

2713 from ownership or control of trust property only if the trustee
2714 is personally at fault.

2715 (3) A claim based on a contract entered into by a trustee
2716 in the trustee's fiduciary capacity, on an obligation arising
2717 from ownership or control of trust property, or on a tort
2718 committed in the course of administering a trust may be asserted
2719 in a judicial proceeding against the trustee in the trustee's
2720 fiduciary capacity, whether or not the trustee is personally
2721 liable for the claim.

2722 (4) Issues of liability between the trust estate and the
2723 trustee individually may be determined in a proceeding for
2724 accounting, surcharge, or indemnification or in any other
2725 appropriate proceeding.

2726 736.1014 Limitations on actions against certain trusts.--

2727 (1) After the death of a settlor, no creditor of the
2728 settlor may bring, maintain, or continue any direct action
2729 against a trust described in s. 733.707(3), the trustee of the
2730 trust, or any beneficiary of the trust that is dependent on the
2731 individual liability of the settlor. Such claims and causes of
2732 action against the settlor shall be presented and enforced
2733 against the settlor's estate as provided in part VII of chapter
2734 733 and the personal representative of the settlor's estate may
2735 obtain payment from the trustee of a trust described in s.
2736 733.707(3) as provided in ss. 733.607(2), 733.707(3), and
2737 736.05053.

2738 (2) This section does not preclude a direct action against
2739 a trust described in s. 733.707(3), the trustee of the trust, or

HB 425

2006
CS

2740 a beneficiary of the trust that is not dependent on the
2741 individual liability of the settlor.

2742 (3) This section does not affect the lien of any duly
2743 recorded mortgage or security interest or the lien of any person
2744 in possession of personal property or the right to foreclose and
2745 enforce the mortgage or lien.

2746 736.1015 Interest as general partner.--

2747 (1) Unless personal liability is imposed in the contract,
2748 a trustee who holds an interest as a general partner in a
2749 general or limited partnership is not personally liable on a
2750 contract entered into by the partnership after the trust's
2751 acquisition of the interest if the fiduciary capacity was
2752 disclosed in the contract or in a statement previously filed
2753 pursuant to a Uniform Partnership Act or Uniform Limited
2754 Partnership Act.

2755 (2) A trustee who holds an interest as a general partner
2756 is not personally liable for torts committed by the partnership
2757 or for obligations arising from ownership or control of the
2758 interest unless the trustee is personally at fault.

2759 (3) If the trustee of a revocable trust holds an interest
2760 as a general partner, the settlor is personally liable for
2761 contracts and other obligations of the partnership as if the
2762 settlor were a general partner.

2763 736.1016 Protection of person dealing with trustee.--

2764 (1) A person other than a beneficiary who in good faith
2765 assists a trustee or who in good faith and for value deals with
2766 a trustee, without knowledge that the trustee is exceeding or

HB 425

2006
CS

2767 improperly exercising the trustee's powers, is protected from
2768 liability as if the trustee properly exercised the power.

2769 (2) A person other than a beneficiary who in good faith
2770 deals with a trustee is not required to inquire into the extent
2771 of the trustee's powers or the propriety of their exercise.

2772 (3) A person who in good faith delivers assets to a
2773 trustee need not ensure their proper application.

2774 (4) A person other than a beneficiary who in good faith
2775 assists a former trustee or who in good faith and for value
2776 deals with a former trustee, without knowledge that the
2777 trusteeship has terminated, is protected from liability as if
2778 the former trustee were still a trustee.

2779 (5) Comparable protective provisions of other laws
2780 relating to commercial transactions or transfer of securities by
2781 fiduciaries prevail over the protection provided by this
2782 section.

2783 736.1017 Certification of trust.--

2784 (1) Instead of furnishing a copy of the trust instrument
2785 to a person other than a beneficiary, the trustee may furnish to
2786 the person a certification of trust containing the following
2787 information:

2788 (a) The trust exists and the date the trust instrument was
2789 executed.

2790 (b) The identity of the settlor.

2791 (c) The identity and address of the currently acting
2792 trustee.

2793 (d) The powers of the trustee.

HB 425

2006
CS

(e) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust.

(f) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee.

(g) The manner of taking title to trust property.

(2) A certification of trust may be signed or otherwise authenticated by any trustee.

(3) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(4) A certification of trust need not contain the dispositive terms of a trust.

(5) A recipient of a certification of trust may require the trustee to furnish copies of any excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(6) A person who acts in reliance on a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the certification.

HB 425

2006
CS

(7) A person who in good faith enters into a transaction in reliance on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(8) This section does not limit the right of a person to obtain a copy of the trust instrument when required to be furnished by law or in a judicial proceeding concerning the trust.

736.1018 Improper distribution or payment; liability of distributee.--Any person who received a distribution or was paid improperly from a trust shall return the assets or funds received and the income from those assets or interest on the funds from the date of distribution or payment unless the distribution or payment cannot be questioned because of adjudication, estoppel, or limitations. If the person does not have the assets or funds, the value of the assets or funds at the date of disposition, income from the assets or funds, and gain received by the person from the assets or funds shall be returned.

Section 11. Part XI of chapter 736, Florida Statutes, consisting of sections 736.1101, 736.1102, 736.1103, 736.1104, 736.1105, 736.1106, 736.1107, and 736.1108, is created to read:

PART XI

RULES OF CONSTRUCTION

736.1101 Rules of construction; general provisions.--Except as provided in s. 736.0105(2):

HB 425

2006
CS

(1) The intent of the settlor as expressed in the terms of the trust controls the legal effect of the dispositions made in the trust.

(2) The rules of construction as expressed in this part shall apply unless a contrary intent is indicated by the terms of the trust.

736.1102 Construction of generic terms.--Adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship, in accordance with rules for determining relationships for purposes of intestate succession.

736.1103 Gifts to multi-generation classes to be per stirpes.--Class gifts to descendants, issue, and other multi-generation classes shall be per stirpes.

736.1104 Killer not entitled to receive property or other benefits by reason of victim's death.--

(1) A beneficiary of a trust who unlawfully and intentionally kills or unlawfully and intentionally participates in procuring the death of the settlor or another person on whose death such beneficiary's interest depends, is not entitled to any trust interest, including homestead, dependent on the victim's death and such interest shall devolve as though the killer had predeceased the victim.

(2) A final judgment of conviction of murder in any degree is conclusive for the purposes of this section. In the absence of a murder conviction in any degree, the court may determine by the greater weight of the evidence whether the killing was unlawful and intentional for purposes of this section.

HB 425

2006
CS

2877 736.1105 Dissolution of marriage; effect on revocable
2878 trust.--Unless the trust instrument or the judgment for
2879 dissolution of marriage or divorce expressly provides otherwise,
2880 if a revocable trust is executed by a husband or wife as settlor
2881 prior to annulment of the marriage or entry of a judgment for
2882 dissolution of marriage or divorce of the settlor from the
2883 settlor's spouse, any provision of the trust that affects the
2884 settlor's spouse will become void upon annulment of the marriage
2885 or entry of the judgment of dissolution of marriage or divorce
2886 and any such trust shall be administered and construed as if the
2887 settlor's spouse had died on the date of the annulment or on
2888 entry of the judgment for dissolution of marriage or divorce.

2889 736.1106 Antilapse; survivorship with respect to future
2890 interests under terms of inter vivos and testamentary trusts;
2891 substitute takers.--

2892 (1) As used in this section, the term:

2893 (a) "Beneficiary" means the beneficiary of a future
2894 interest and includes a class member if the future interest is
2895 in the form of a class gift.

2896 (b) "Distribution date," with respect to a future
2897 interest, means the time when the future interest is to take
2898 effect in possession or enjoyment. The distribution date need
2899 not occur at the beginning or end of a calendar day, but can
2900 occur at a time during the course of a day.

2901 (c) "Future interest" includes an alternative future
2902 interest and a future interest in the form of a class gift.

2903 (d) "Future interest under the terms of a trust" means a
2904 future interest created by an inter vivos or testamentary

HB 425

2006
CS

2905 transfer to an existing trust or creating a trust or by an
2906 exercise of a power of appointment to an existing trust
2907 directing the continuance of an existing trust, designating a
2908 beneficiary of an existing trust, or creating a trust.

2909 (e) "Surviving beneficiary" or "surviving descendant"
2910 means a beneficiary or a descendant who did not predecease the
2911 distribution date or is not deemed to have predeceased the
2912 distribution date by operation of law.

2913 (2) A future interest under the terms of a trust is
2914 contingent upon the beneficiary surviving the distribution date.
2915 Unless a contrary intent appears in the trust instrument, if a
2916 beneficiary of a future interest under the terms of a trust
2917 fails to survive the distribution date, and the deceased
2918 beneficiary leaves surviving descendants, a substitute gift is
2919 created in the beneficiary's surviving descendants. They take
2920 per stirpes the property to which the beneficiary would have
2921 been entitled if the beneficiary had survived the distribution
2922 date.

2923 (3) In the application of this section:

2924 (a) Words of survivorship attached to a future interest
2925 are a sufficient indication of an intent contrary to the
2926 application of this section.

2927 (b) A residuary clause in a will is not a sufficient
2928 indication of an intent contrary to the application of this
2929 section, whether or not the will specifically provides that
2930 lapsed or failed devises are to pass under the residuary clause.

HB 425

2006
CS

2931 (4) If, after the application of subsections (2) and (3),
2932 there is no surviving taker, the property passes in the
2933 following order:

2934 (a) If the future interest was created by the exercise of
2935 a power of appointment, the property passes under the donor's
2936 gift-in-default clause, if any, which clause is treated as
2937 creating a future interest under the terms of a trust.

2938 (b) If no taker is produced by the application of
2939 paragraph (a) and the trust was created in a nonresiduary devise
2940 or appointment in the transferor's will, the property passes
2941 under the residuary clause in the transferor's will. For
2942 purposes of this section, the residuary clause is treated as
2943 creating a future interest under the terms of a trust.

2944 (c) If no taker is produced by the application of
2945 paragraph (a) or paragraph (b), the property passes to those
2946 persons, including the state, and in such shares as would
2947 succeed to the transferor's intestate estate under the intestate
2948 succession law of the transferor's domicile if the transferor
2949 died when the disposition is to take effect in possession or
2950 enjoyment.

2951
2952 For purposes of paragraphs (b) and (c), the term "transferor"
2953 with respect to a future interest created by the exercise of a
2954 power of appointment, means the donor if the power was a
2955 nongeneral power and the donee if the power was a general power.

2956 (5) This section applies to all trusts other than trusts
2957 that were irrevocable before the effective date of this code.

HB 425

2006
CS

736.1107 Change in securities; accessions;
nonademption.--A gift of specific securities, rather than their
equivalent value, entitles the beneficiary only to:

(1) As much of the gifted securities of the same issuer
held by the trust estate at the time of the occurrence of the
event entitling the beneficiary to distribution.

(2) Any additional or other securities of the same issuer
held by the trust estate because of action initiated by the
issuer, excluding any acquired by exercise of purchase options.

(3) Securities of another issuer held by the trust estate
as a result of a merger, consolidation, reorganization, or other
similar action initiated by the original issuer.

736.1108 Penalty clause for contest.--

(1) A provision in a trust instrument purporting to
penalize any interested person for contesting the trust
instrument or instituting other proceedings relating to a trust
estate or trust assets is unenforceable.

(2) This section applies to trusts created on or after
October 1, 1993. For purposes of this subsection, a revocable
trust shall be treated as created when the right of revocation
terminates.

Section 12. Part XII of chapter 736, Florida Statutes,
consisting of sections 736.1201, 736.1202, 736.1203, 736.1204,
736.1205, 736.1206, 736.1207, 736.1208, 736.1209, and 736.1210,
is created to read:

PART XII

CHARITABLE TRUSTS

HB 425

2006
CS

736.1201 Definitions.--As used in this part:

(1) "Charitable organization" means an organization described in s. 501(c)(3) of the Internal Revenue Code and exempt from tax under s. 501(a) of the Internal Revenue Code.

(2) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended.

(3) "Private foundation trust" means a trust, including a trust described in s. 4947(a)(1) of the Internal Revenue Code, as defined in s. 509(a) of the Internal Revenue Code.

(4) "Split interest trust" means a trust for individual and charitable beneficiaries that is subject to the provisions of s. 4947(a)(2) of the Internal Revenue Code.

(5) "State attorney" means the state attorney for the judicial circuit of the principal place of administration of the trust pursuant to s. 736.0108.

736.1202 Application of this part.--Except as otherwise provided in the trust, the provisions of this part apply to all private foundation trusts and split interest trusts, whether created or established before or after November 1, 1971, and to all trust assets acquired by the trustee before or after November 1, 1971.

736.1203 Trustee of a private foundation trust or a split interest trust.--Except as provided in s. 736.1205, the trustee of a private foundation trust or a split interest trust has the duties and powers conferred on the trustee by this part.

736.1204 Powers and duties of trustee of a private foundation trust or a split interest trust.--

HB 425

2006
CS

(1) In the exercise of a trustee's powers, including the powers granted by this part, a trustee has a duty to act with due regard to the trustee's obligation as a fiduciary, including a duty not to exercise any power in such a way as to:

(a) Deprive the trust of an otherwise available tax exemption, deduction, or credit for tax purposes;

(b) Deprive a donor of a trust asset or tax deduction or credit; or

(c) Operate to impose a tax on a donor, trust, or other person.

For purposes of this subsection, the term "tax" includes, but is not limited to, any federal, state, or local excise, income, gift, estate, or inheritance tax.

(2) Except as provided in s. 736.1205, a trustee of a private foundation trust shall make distributions at such time and in such manner as not to subject the trust to tax under s. 4942 of the Internal Revenue Code.

(3) Except as provided in subsection (4) and in s. 736.1205, a trustee of a private foundation trust, or a split interest trust to the extent that the split interest trust is subject to the provisions of s. 4947(a)(2) of the Internal Revenue Code, in the exercise of the trustee's powers shall not:

(a) Engage in any act of self-dealing as defined in s. 4941(d) of the Internal Revenue Code;

(b) Retain any excess business holdings as defined in s. 4943(c) of the Internal Revenue Code;

HB 425

2006
CS

(c) Make any investments in a manner that subjects the foundation to tax under s. 4944 of the Internal Revenue Code; or

(d) Make any taxable expenditures as defined in s. 4945(d) of the Internal Revenue Code.

(4) Paragraphs (3)(b) and (c) shall not apply to a split interest trust if:

(a) All the interest from income, and none of the remainder interest, of the trust is devoted solely to one or more of the purposes described in s. 170(c)(2)(B) of the Internal Revenue Code, and all amounts in the trust for which a deduction was allowed under s. 170, s. 545(b)(2), s. 556(b)(2), s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the Internal Revenue Code have an aggregate fair market value of not more than 60 percent of the aggregate fair market value of all amounts in the trust; or

(b) A deduction was allowed under s. 170, s. 545(b)(2), s. 556(b)(2), s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the Internal Revenue Code for amounts payable under the terms of the trust to every remainder beneficiary but not to any income beneficiary.

736.1205 Notice that this part does not apply.--In the case of a power to make distributions, if the trustee determines that the governing instrument contains provisions that are more restrictive than s. 736.1204(2), or if the trust contains other powers, inconsistent with the provisions of s. 736.1204(3) that specifically direct acts by the trustee, the trustee shall notify the state attorney when the trust becomes subject to this part. Section 736.1204 does not apply to any trust for which

HB 425

2006
CS

notice has been given pursuant to this section unless the trust is amended to comply with the terms of this part.

736.1206 Power to amend trust instrument.--

(1) In the case of a trust that is solely for a named charitable organization or organizations and for which the trustee does not possess any discretion concerning the distribution of income or principal among two or more such organizations, the trustee may amend the governing instrument to comply with the provisions of s. 736.1204(2) with the consent of the named charitable organization or organizations.

(2) In the case of a charitable trust that is not subject to the provisions of subsection (1), the trustee may amend the governing instrument to comply with the provisions of s. 736.1204(2) with the consent of the state attorney.

736.1207 Power of court to permit deviation.--This part does not affect the power of a court to relieve a trustee from any restrictions on the powers and duties that are placed on the trustee by the governing instrument or applicable law for cause shown and on complaint of the trustee, state attorney, or an affected beneficiary and notice to the affected parties.

736.1208 Release; property and persons affected; manner of effecting.--

(1) The trustee of a trust, all of the unexpired interests in which are devoted to one or more charitable purposes, may release a power to select charitable donees unless the creating instrument provides otherwise.

(2) The release of a power to select charitable donees may apply to all or any part of the property subject to the power

HB 425

2006

CS

and may reduce or limit the charitable organizations, or classes of charitable organizations, in whose favor the power is exercisable.

(3) A release shall be effected by a duly acknowledged written instrument signed by the trustee and delivered as provided in subsection (4).

(4) Delivery of a release shall be accomplished as follows:

(a) If the release is accomplished by specifying a charitable organization or organizations as beneficiary or beneficiaries of the trust, by delivery of a copy of the release to each designated charitable organization.

(b) If the release is accomplished by reducing the class of permissible charitable organizations, by delivery of a copy of the release to the state attorney.

(5) If a release is accomplished by specifying a public charitable organization or organizations as beneficiary or beneficiaries of the trust, the trust at all times thereafter shall be operated exclusively for the benefit of, and be supervised by, the specified public charitable organization or organizations.

736.1209 Election to come under this part.--With the consent of that organization or organizations, a trustee of a trust for the benefit of a public charitable organization or organizations may come under s. 736.0838(5) by filing with the state attorney an election, accompanied by the proof of required consent. Thereafter the trust shall be subject to s. 736.1208(5).

HB 425

2006
CS

736.1210 Interpretation.--This part shall be interpreted to effectuate the intent of the state to preserve, foster, and encourage gifts to, or for the benefit of, charitable organizations.

Section 13. Part XIII of chapter 736, Florida Statutes, consisting of sections 736.1301, 736.1302, and 736.1303, is created to read:

PART XIII
MISCELLANEOUS

736.1301 Electronic records and signatures.--Any provisions of this code governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, are deemed to conform to the requirements of s. 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. s. 7002, and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

736.1302 Severability clause.--If any provision of this code or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this code that can be given effect without the invalid provision or application, and to this end the provisions of this code are severable.

736.1303 Application to existing relationships.--

HB 425

2006
CS

3152 (1) Except as otherwise provided in this code, on July 1,
3153 2007:
3154 (a) This code applies to all trusts created before, on, or
3155 after such date.
3156 (b) This code applies to all judicial proceedings
3157 concerning trusts commenced on or after such date.
3158 (c) This code applies to judicial proceedings concerning
3159 trusts commenced before such date, unless the court finds that
3160 application of a particular provision of this code would
3161 substantially interfere with the effective conduct of the
3162 judicial proceedings or prejudice the rights of the parties, in
3163 which case the particular provision of this code does not apply
3164 and the superseded law applies.
3165 (d) Any rule of construction or presumption provided in
3166 this code applies to trust instruments executed before the
3167 effective date of this code unless there is a clear indication
3168 of a contrary intent in the terms of the trust.
3169 (e) An act done before such date is not affected by this
3170 code.
3171 (2) If a right is acquired, extinguished, or barred on the
3172 expiration of a prescribed period that has commenced to run
3173 under any other law before July 1, 2007, that law continues to
3174 apply to the right even if it has been repealed or superseded.
3175 Section 14. Paragraph (a) of subsection (5) of section
3176 497.458, Florida Statutes, is amended to read:
3177 497.458 Disposition of proceeds received on contracts.--
3178 (5) The trustee of the trust established pursuant to this
3179 section shall only have the power to:

HB 425

2006
CS

(a) Invest in investments as prescribed in s. 215.47 and exercise the powers set forth in part VIII of chapter 736 ~~part IV of chapter 737~~, provided that the licensing authority may by order require the trustee to liquidate or dispose of any investment within 30 days after such order, or within such other times as the order may direct. The licensing authority may issue such order if it determines that the investment violates any provision of this chapter or is not in the best interests of the preneed contract holders whose contracts are secured by the trust funds.

Section 15. Section 518.117, Florida Statutes, is created to read:

518.117 Permissible investments of fiduciary funds.--A fiduciary that is authorized by lawful authority to engage in trust business as defined in s. 658.12(20) may invest fiduciary funds in accordance with s. 660.417 so long as the investment otherwise complies with this chapter.

Section 16. Subsection (2) of section 607.0802, Florida Statutes, is amended to read:

607.0802 Qualifications of directors.--

(2) In the event that the eligibility to serve as a member of the board of directors of a condominium association, cooperative association, homeowners' association, or mobile home owners' association is restricted to membership in such association and membership is appurtenant to ownership of a unit, parcel, or mobile home, a grantor of a trust described in s. 733.707(3), or a qualified beneficiary as defined in s. 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,

HB 425

2006
CS

3208 or mobile home shall be deemed a member of the association and
3209 eligible to serve as a director of the condominium association,
3210 cooperative association, homeowners' association, or mobile home
3211 owners' association, provided that said beneficiary occupies the
3212 unit, parcel, or mobile home.

3213 Section 17. Subsection (2) of section 617.0802, Florida
3214 Statutes, is amended to read:

3215 617.0802 Qualifications of directors.--

3216 (2) In the event that the eligibility to serve as a member
3217 of the board of directors of a condominium association,
3218 cooperative association, homeowners' association, or mobile home
3219 owners' association is restricted to membership in such
3220 association and membership is appurtenant to ownership of a
3221 unit, parcel, or mobile home, a grantor of a trust described in
3222 s. 733.707(3), or a qualified beneficiary as defined in s.
3223 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,
3224 or mobile home shall be deemed a member of the association and
3225 eligible to serve as a director of the condominium association,
3226 cooperative association, homeowners' association, or mobile home
3227 owners' association, provided that said beneficiary occupies the
3228 unit, parcel, or mobile home.

3229 Section 18. Subsection (6) of section 660.25, Florida
3230 Statutes, renumbered as subsection (7) and amended, and a new
3231 subsection (6) is added to that section, to read:

3232 660.25 Definitions.--Subject to other definitions
3233 contained in other sections of this code, and unless the context
3234 otherwise requires, in this chapter:

HB 425

2006
CS

(6) "Investment instrument" means any security as defined in s. 2(a)(1) of the Securities Act of 1933; any security of an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended; any contract of sale of a commodity for future delivery within the meaning of s. 2(i) of the Commodity Exchange Act; or any other interest in securities, including, but not limited to, shares or interests in a private investment fund, including, but not limited to, a private investment fund organized as a limited partnership, a limited liability company, a statutory or common law business trust, a statutory trust, or a real estate investment trust, a joint venture, or any other general or limited partnership; derivatives or other interests of any nature in securities such as options, options on futures, and variable forward contracts; mutual funds; common trust funds; money market funds; hedge funds; private equity or venture capital funds; insurance contracts; and other entities or vehicles investing in securities or interests in securities whether registered or otherwise.

~~(7)~~~~(6)~~ Terms used but not defined in this chapter, but which are expressly defined in chapter 518, the financial institutions codes, chapter 732, chapter 733, chapter 734, chapter 735, chapter 736 ~~737~~, chapter 738, chapter 744, or chapter 747, shall in this chapter, unless the context otherwise requires, have the meanings ascribed to them in said chapters; and references in any of said chapters to a "trust company" or

HB 425

2006
CS

to "trust companies" shall include every trust department as defined in s. 658.12.

Section 19. Section 660.417, Florida Statutes, is amended to read:

660.417 Investment of fiduciary funds in investment instruments ~~into mutual fund accounts~~; permissible activity under certain circumstances; limitations.--

(1) In addition to other investments authorized by law for the investment of funds held by a fiduciary, or by the instrument governing the fiduciary relationship, ~~and notwithstanding any other provision of law~~, a bank or trust company acting as a fiduciary, agent or otherwise may, in the exercise of its investment discretion or at the direction of another person authorized to direct investment of funds held by the bank or trust company as fiduciary, invest and reinvest in investment instruments ~~the securities of an open end or closed end management investment company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended~~, so long as the ~~portfolio of such investment instruments consist~~ company or investment trust consists substantially of investments not prohibited by the governing instrument.

(2) The fact that such bank or trust company or an affiliate of the bank or trust company provides services with respect to the investment instruments ~~company or investment trust~~ such as that of an investment adviser, administrator, broker, custodian, transfer agent, placement agent, servicing agent, registrar, underwriter, sponsor, distributor, or manager

HB 425

2006
CS

or in any other capacity, ~~otherwise~~ and is receiving reasonable compensation for those services, shall not preclude such bank or trust company from investing or reinvesting in investment instruments ~~the securities of the open end or closed end management investment trust registered under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended.~~ However, with respect to any funds so invested, the basis (expressed as a percentage of asset value or otherwise) upon which such compensation is calculated shall be disclosed (by prospectus, account statement or otherwise) to all persons to whom statements of such account are rendered.

(3) The fact that such bank or trust company or an affiliate of the bank or trust company owns or controls investment instruments shall not preclude the bank or trust company acting as a fiduciary from investing or reinvesting in such investment instruments, provided such investment instruments:

(a) Are held for sale by the bank or trust company or by an affiliate of the bank or trust company in the ordinary course of its business of providing investment services to its customers and do not include any such interests held by the bank or trust company or by an affiliate of the bank or trust company for its own account.

(b) Are sold primarily to accounts for which the bank or trust company is not acting as a fiduciary upon terms that are not more favorable to the buyer than the terms upon which they are sold to accounts for which the bank or trust company is acting as a fiduciary.

HB 425

2006
CS

Section 20. Paragraphs (a), (d), and (e) of subsection (1) and subsections (2), (3), (9), and (10) of section 660.46, Florida Statutes, are amended to read:

660.46 Substitution of fiduciaries.--

(1) The provisions of this section shall apply to the transfer of fiduciary accounts by substitution, and for those purposes these provisions shall constitute alternative procedures to those provided or required by any other provisions of law relating to the transfer of fiduciary accounts or the substitution of persons acting or who are to act in a fiduciary capacity. In this section, and only for its purposes, the term:

(a) "Limitation notice" has the meaning ascribed in s. 736.1008(4) ~~737.307(3)~~.

(d) "Trust accounting" has the meaning ascribed in s. 736.08135 ~~737.3035~~.

(e) "Trust disclosure document" has the meaning ascribed in s. 736.1008(4)(a) ~~737.307(2)~~.

(2) Any original fiduciary and any proposed substitute fiduciary may, with respect to any fiduciary account or accounts which they shall mutually select, initiate proceedings by joining in the filing of a petition in the circuit court, requesting the substitution of the proposed substitute fiduciary for the original fiduciary as to such fiduciary account or accounts. The petition may be filed in the county in which the main office of the original fiduciary is located and, except to the extent inconsistent with the provisions of this section, shall be governed by the Florida Rules of Civil Procedure; however, if any fiduciary account is then the subject of a

HB 425

2006
CS

proceeding in a court in this state pursuant to the Florida Probate Code, the Florida Guardianship Law, chapter 736 ~~737~~, or chapter 747, the petition relating to such fiduciary account shall be filed in that proceeding and shall be governed by the procedural or other relevant rules applicable to such proceeding except to the extent inconsistent with the provisions of this section.

(3) Unless a waiver or consent shall be filed in the proceedings as provided in subsection (4), the provisions of s. 731.301(1) and (2) shall apply with respect to notice of the proceedings to all persons who are then cofiduciaries with the original fiduciary, other than a person joining as a petitioner in the proceedings; to all persons named in the governing instrument as substitutes or successors to the fiduciary capacity of the original fiduciary; to the persons then living who are entitled under the governing instrument to appoint a substitute or successor to act in the fiduciary capacity of the original fiduciary; to all vested beneficiaries of the fiduciary account; and to all then-living originators of the governing instrument. Unless a waiver or consent shall be filed in the proceedings as provided in subsection (4), the provisions of s. 731.301 shall apply with respect to notice to all contingent beneficiaries of the fiduciary account. Only the persons or classes of persons described in the foregoing provisions of this subsection shall be deemed to be interested persons for the purposes of this section and the proceedings and notices provided for in this section; and the provisions of ss. 731.301(3) and 731.303(3) and ~~(4)~~ ~~(5)~~ part III of chapter

HB 425

2006
CS

3374 736, relating to notice requirements, the effect of notice, and
3375 representation of interests, shall apply to the proceedings
3376 provided for in this section.

3377 (9) Unless previously or otherwise barred by adjudication,
3378 waiver, consent, limitation, or the provisions of subsection
3379 (8), an action for breach of trust or breach of fiduciary duties
3380 or responsibilities against an original fiduciary in whose place
3381 and stead another trust company or trust department has been
3382 substituted pursuant to the provisions of this section is barred
3383 for any beneficiary who has received a trust disclosure document
3384 adequately disclosing the matter unless a proceeding to assert
3385 the claim is commenced within 6 months after receipt of the
3386 trust disclosure document or the limitation notice that applies
3387 to the trust disclosure document, whichever is received later.
3388 In any event, and notwithstanding lack of adequate disclosure,
3389 all claims against such original fiduciary which has complied
3390 with the requirements of s. 736.1008 ~~issued a final trust~~
3391 ~~disclosure document received by the beneficiary and has informed~~
3392 ~~the beneficiary of the location and availability of records for~~
3393 ~~his or her examination~~ are barred as provided in chapter 95.
3394 Section 736.1008(4)(a) and (c) ~~737.307(2) and (3)~~ applies to
3395 this subsection.

3396 (10) A beneficiary has received a final trust disclosure
3397 document or a limitation notice if, when the beneficiary is an
3398 adult, it is received by him or her or if, when the beneficiary
3399 is a minor or a disabled person, it is received by his or her
3400 representative as provided in part III of chapter 736 ~~defined in~~
3401 ~~s. 731.303.~~

HB 425

2006
CS

Section 21. Section 660.418, Florida Statutes, is amended to read:

660.418 Investment of fiduciary funds in syndicate securities.--Notwithstanding any other provision of law, any financial institution with fiduciary powers may, in its fiduciary capacity, purchase bonds or other securities underwritten or otherwise distributed by the financial institution or by a syndicate that includes the financial institution, or an affiliate of the financial institution, provided that such purchase is made through a licensed securities dealer, is otherwise prudent, and is not prohibited by the instrument governing the fiduciary relationship and that disclosure is made at least annually to those persons entitled to a statement of accounts pursuant to s. 736.0813 ~~737.303(4)~~ indicating that such securities have been or may be purchased. This section applies to purchases of bonds or other securities made at the time of the initial offering of such bonds or securities or at any time after such initial offering.

Section 22. Subsection (5) of section 689.071, Florida Statutes, is amended to read:

689.071 Land trusts transferring interests in real estate; ownership vests in trustee.--

(5) In addition to any other limitation on personal liability existing pursuant to statute or otherwise, the provisions of s. 736.1013 ~~737.306~~ apply to the trustee of a land trust created pursuant to this section.

Section 23. Subsections (1) and (4) of section 689.075, Florida Statutes, are amended to read:

HB 425

2006
CS

3430 689.075 Inter vivos trusts; powers retained by settlor.--
3431 (1) A trust which is otherwise valid and which complies
3432 with s. 736.0403 ~~737.111~~, including, but not limited to, a trust
3433 the principal of which is composed of real property, intangible
3434 personal property, tangible personal property, the possible
3435 expectancy of receiving as a named beneficiary death benefits as
3436 described in s. 733.808, or any combination thereof, and which
3437 has been created by a written instrument shall not be held
3438 invalid or an attempted testamentary disposition for any one or
3439 more of the following reasons:
3440 (a) Because the settlor or another person or both possess
3441 the power to revoke, amend, alter, or modify the trust in whole
3442 or in part;
3443 (b) Because the settlor or another person or both possess
3444 the power to appoint by deed or will the persons and
3445 organizations to whom the income shall be paid or the principal
3446 distributed;
3447 (c) Because the settlor or another person or both possess
3448 the power to add to, or withdraw from, the trust all or any part
3449 of the principal or income at one time or at different times;
3450 (d) Because the settlor or another person or both possess
3451 the power to remove the trustee or trustees and appoint a
3452 successor trustee or trustees;
3453 (e) Because the settlor or another person or both possess
3454 the power to control the trustee or trustees in the
3455 administration of the trust;

HB 425

2006
CS

(f) Because the settlor has retained the right to receive all or part of the income of the trust during her or his life or for any part thereof; or

(g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee.

(4) This section shall be applicable to trusts executed before or after July 1, 1969, by persons who are living on or after said date. ~~However, the requirement of conformity with the formalities for the execution of wills as found in paragraph (1)(g) shall not be imposed upon any trust executed prior to July 1, 1969.~~

Section 24. Section 689.175, Florida Statutes, is created to read:

689.175 Worthier title doctrine abolished.--The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs," "heirs at law," "next of kin," "distributees," "relatives," or "family," or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

Section 25. Subsection (8) of section 709.08, Florida Statutes, is amended to read:

709.08 Durable power of attorney.--

(8) STANDARD OF CARE.--Except as otherwise provided in paragraph (4)(e), an attorney in fact is a fiduciary who must observe the standards of care applicable to trustees as described in s. 736.0901 ~~737.302~~. The attorney in fact is not liable to third parties for any act pursuant to the durable

HB 425

2006
CS

3484 power of attorney if the act was authorized at the time. If the
3485 exercise of the power is improper, the attorney in fact is
3486 liable to interested persons as described in s. 731.201 for
3487 damage or loss resulting from a breach of fiduciary duty by the
3488 attorney in fact to the same extent as the trustee of an express
3489 trust.

3490 Section 26. Paragraph (c) of subsection (2) of section
3491 721.08, Florida Statutes, is amended to read:

3492 721.08 Escrow accounts; nondisturbance instruments;
3493 alternate security arrangements; transfer of legal title.--

3494 (2) One hundred percent of all funds or other property
3495 which is received from or on behalf of purchasers of the
3496 timeshare plan or timeshare interest prior to the occurrence of
3497 events required in this subsection shall be deposited pursuant
3498 to an escrow agreement approved by the division. The funds or
3499 other property may be released from escrow only as follows:

3500 (c) Compliance with conditions.--

3501 1. Timeshare licenses.--If the timeshare plan is one in
3502 which timeshare licenses are to be sold and no cancellation or
3503 default has occurred, the escrow agent may release the escrowed
3504 funds or other property to or on the order of the developer upon
3505 presentation of:

3506 a. An affidavit by the developer that all of the following
3507 conditions have been met:

3508 (I) Expiration of the cancellation period.

3509 (II) Completion of construction.

3510 (III) Closing.

3511 (IV) Either:

HB 425

2006
CS

3512 (A) Execution, delivery, and recordation by each
3513 interestholder of the nondisturbance and notice to creditors
3514 instrument, as described in this section; or

3515 (B) Transfer by the developer of legal title to the
3516 subject accommodations and facilities, or all use rights
3517 therein, into a trust satisfying the requirements of
3518 subparagraph 4. and the execution, delivery, and recordation by
3519 each other interestholder of the nondisturbance and notice to
3520 creditors instrument, as described in this section.

3521 b. A certified copy of each recorded nondisturbance and
3522 notice to creditors instrument.

3523 c. One of the following:

3524 (I) A copy of a memorandum of agreement, as defined in s.
3525 721.05, together with satisfactory evidence that the original
3526 memorandum of agreement has been irretrievably delivered for
3527 recording to the appropriate official responsible for
3528 maintaining the public records in the county in which the
3529 subject accommodations and facilities are located. The original
3530 memorandum of agreement must be recorded within 180 days after
3531 the date on which the purchaser executed her or his purchase
3532 agreement.

3533 (II) A notice delivered for recording to the appropriate
3534 official responsible for maintaining the public records in each
3535 county in which the subject accommodations and facilities are
3536 located notifying all persons of the identity of an independent
3537 escrow agent or trustee satisfying the requirements of
3538 subparagraph 4. that shall maintain separate books and records,
3539 in accordance with good accounting practices, for the timeshare

HB 425

2006
CS

3540 plan in which timeshare licenses are to be sold. The books and
3541 records shall indicate each accommodation and facility that is
3542 subject to such a timeshare plan and each purchaser of a
3543 timeshare license in the timeshare plan.

3544 2. Timeshare estates.--If the timeshare plan is one in
3545 which timeshare estates are to be sold and no cancellation or
3546 default has occurred, the escrow agent may release the escrowed
3547 funds or other property to or on the order of the developer upon
3548 presentation of:

3549 a. An affidavit by the developer that all of the following
3550 conditions have been met:

3551 (I) Expiration of the cancellation period.

3552 (II) Completion of construction.

3553 (III) Closing.

3554 b. If the timeshare estate is sold by agreement for deed,
3555 a certified copy of the recorded nondisturbance and notice to
3556 creditors instrument, as described in this section.

3557 c. Evidence that each accommodation and facility:

3558 (I) Is free and clear of the claims of any
3559 interestholders, other than the claims of interestholders that,
3560 through a recorded instrument, are irrevocably made subject to
3561 the timeshare instrument and the use rights of purchasers made
3562 available through the timeshare instrument;

3563 (II) Is the subject of a recorded nondisturbance and
3564 notice to creditors instrument that complies with subsection (3)
3565 and s. 721.17; or

3566 (III) Has been transferred into a trust satisfying the
3567 requirements of subparagraph 4.

HB 425

2006
CS

3568 d. Evidence that the timeshare estate:
3569 (I) Is free and clear of the claims of any
3570 interestholders, other than the claims of interestholders that,
3571 through a recorded instrument, are irrevocably made subject to
3572 the timeshare instrument and the use rights of purchasers made
3573 available through the timeshare instrument; or
3574 (II) Is the subject of a recorded nondisturbance and
3575 notice to creditors instrument that complies with subsection (3)
3576 and s. 721.17.
3577 3. Personal property timeshare interests.--If the
3578 timeshare plan is one in which personal property timeshare
3579 interests are to be sold and no cancellation or default has
3580 occurred, the escrow agent may release the escrowed funds or
3581 other property to or on the order of the developer upon
3582 presentation of:
3583 a. An affidavit by the developer that all of the following
3584 conditions have been met:
3585 (I) Expiration of the cancellation period.
3586 (II) Completion of construction.
3587 (III) Closing.
3588 b. If the personal property timeshare interest is sold by
3589 agreement for transfer, evidence that the agreement for transfer
3590 complies fully with s. 721.06 and this section.
3591 c. Evidence that one of the following has occurred:
3592 (I) Transfer by the owner of the underlying personal
3593 property of legal title to the subject accommodations and
3594 facilities or all use rights therein into a trust satisfying the
3595 requirements of subparagraph 4.; or

HB 425

2006
CS

(II) Transfer by the owner of the underlying personal property of legal title to the subject accommodations and facilities or all use rights therein into an owners' association satisfying the requirements of subparagraph 5.

d. Evidence of compliance with the provisions of subparagraph 6., if required.

e. If a personal property timeshare plan is created with respect to accommodations and facilities that are located on or in an oceangoing vessel, including a "documented vessel" or a "foreign vessel," as defined and governed by 46 U.S.C., chapter 301:

(I) In making the transfer required in sub-subparagraph c., the developer shall use as its transfer instrument a document that establishes and protects the continuance of the use rights in the subject accommodations and facilities in a manner that is enforceable by the trust or owners' association.

(II) The transfer instrument shall comply fully with the provisions of this chapter, shall be part of the timeshare instrument, and shall contain specific provisions that:

(A) Prohibit the vessel owner, the developer, any manager or operator of the vessel, the owners' association or the trustee, the managing entity, or any other person from incurring any liens against the vessel except for liens that are required for the operation and upkeep of the vessel, including liens for fuel expenditures, repairs, crews' wages, and salvage, and except as provided in sub-sub-subparagraphs 4.b.(III) and 5.b.(III). All expenses, fees, and taxes properly incurred in connection with the creation, satisfaction, and discharge of any

HB 425

2006
CS

such permitted lien, or a prorated portion thereof if less than all of the accommodations on the vessel are subject to the timeshare plan, shall be common expenses of the timeshare plan.

(B) Grant a lien against the vessel in favor of the owners' association or trustee to secure the full and faithful performance of the vessel owner and developer of all of their obligations to the purchasers.

(C) Establish governing law in a jurisdiction that recognizes and will enforce the timeshare instrument and the laws of the jurisdiction of registry of the vessel.

(D) Require that a description of the use rights of purchasers be posted and displayed on the vessel in a manner that will give notice of such rights to any party examining the vessel. This notice must identify the owners' association or trustee and include a statement disclosing the limitation on incurring liens against the vessel described in sub-sub-sub-paragraph (A).

(E) Include the nondisturbance and notice to creditors instrument for the vessel owner and any other interestholders.

(F) The owners' association created under subparagraph 5. or trustee created under subparagraph 4. shall have access to any certificates of classification in accordance with the timeshare instrument.

(III) If the vessel is a foreign vessel, the vessel must be registered in a jurisdiction that permits a filing evidencing the use rights of purchasers in the subject accommodations and facilities, offers protection for such use rights against unfiled and inferior claims, and recognizes the document or

HB 425

2006
CS

3652 instrument creating such use rights as a lien against the
3653 vessel.

3654 (IV) In addition to the disclosures required by s.
3655 721.07(5), the public offering statement and purchase contract
3656 must contain a disclosure in conspicuous type in substantially
3657 the following form:

3658
3659 The laws of the State of Florida govern the offering of this
3660 timeshare plan in this state. There are inherent risks in
3661 purchasing a timeshare interest in this timeshare plan because
3662 the accommodations and facilities of the timeshare plan are
3663 located on a vessel that will sail into international waters and
3664 into waters governed by many different jurisdictions. Therefore,
3665 the laws of the State of Florida cannot fully protect your
3666 purchase of an interest in this timeshare plan. Specifically,
3667 management and operational issues may need to be addressed in
3668 the jurisdiction in which the vessel is registered, which is
3669 (insert jurisdiction in which vessel is registered) . Concerns
3670 of purchasers may be sent to (insert name of applicable
3671 regulatory agency and address) .

3672

3673 4. Trust.--

3674 a. If the subject accommodations or facilities, or all use
3675 rights therein, are to be transferred into a trust in order to
3676 comply with this paragraph, such transfer shall take place
3677 pursuant to this subparagraph.

3678 b. Prior to the transfer by each interestholder of the
3679 subject accommodations and facilities, or all use rights

HB 425

2006
CS

therein, to a trust, any lien or other encumbrance against such accommodations and facilities, or use rights therein, shall be made subject to a nondisturbance and notice to creditors instrument pursuant to subsection (3). No transfer pursuant to this subparagraph shall become effective until the trustee accepts such transfer and the responsibilities set forth herein. A trust established pursuant to this subparagraph shall comply with the following provisions:

(I) The trustee shall be an individual or a business entity authorized and qualified to conduct trust business in this state. Any corporation authorized to do business in this state may act as trustee in connection with a timeshare plan pursuant to this chapter. The trustee must be independent from any developer or managing entity of the timeshare plan or any interestholder of any accommodation or facility of such plan.

(II) The trust shall be irrevocable so long as any purchaser has a right to occupy any portion of the timeshare property pursuant to the timeshare plan.

(III) The trustee shall not convey, hypothecate, mortgage, assign, lease, or otherwise transfer or encumber in any fashion any interest in or portion of the timeshare property with respect to which any purchaser has a right of use or occupancy unless the timeshare plan is terminated pursuant to the timeshare instrument, or such conveyance, hypothecation, mortgage, assignment, lease, transfer, or encumbrance is approved by a vote of two-thirds of all voting interests of the timeshare plan and such decision is declared by a court of competent jurisdiction to be in the best interests of the

HB 425

2006
CS

3708 purchasers of the timeshare plan. The trustee shall notify the
3709 division in writing within 10 days after receiving notice of the
3710 filing of any petition relating to obtaining such a court order.
3711 The division shall have standing to advise the court of the
3712 division's interpretation of the statute as it relates to the
3713 petition.

3714 (IV) All purchasers of the timeshare plan or the owners'
3715 association of the timeshare plan shall be the express
3716 beneficiaries of the trust. The trustee shall act as a fiduciary
3717 to the beneficiaries of the trust. The personal liability of the
3718 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3719 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3720 shall set forth the duties of the trustee. The trustee shall be
3721 required to furnish promptly to the division upon request a copy
3722 of the complete list of the names and addresses of the owners in
3723 the timeshare plan and a copy of any other books and records of
3724 the timeshare plan required to be maintained pursuant to s.
3725 721.13 that are in the possession, custody, or control of the
3726 trustee. All expenses reasonably incurred by the trustee in the
3727 performance of its duties, together with any reasonable
3728 compensation of the trustee, shall be common expenses of the
3729 timeshare plan.

3730 (V) The trustee shall not resign upon less than 90 days'
3731 prior written notice to the managing entity and the division. No
3732 resignation shall become effective until a substitute trustee,
3733 approved by the division, is appointed by the managing entity
3734 and accepts the appointment.

HB 425

2006
CS

3735 (VI) The documents establishing the trust arrangement
3736 shall constitute a part of the timeshare instrument.

3737 (VII) For trusts holding property in a timeshare plan
3738 located outside this state, the trust and trustee holding such
3739 property shall be deemed in compliance with the requirements of
3740 this subparagraph if such trust and trustee are authorized and
3741 qualified to conduct trust business under the laws of such
3742 jurisdiction and the agreement or law governing such trust
3743 arrangement provides substantially similar protections for the
3744 purchaser as are required in this subparagraph for trusts
3745 holding property in a timeshare plan in this state.

3746 (VIII) The trustee shall have appointed a registered agent
3747 in this state for service of process. In the event such a
3748 registered agent is not appointed, service of process may be
3749 served pursuant to s. 721.265.

3750 5. Owners' association.--

3751 a. If the subject accommodations or facilities, or all use
3752 rights therein, are to be transferred into an owners'
3753 association in order to comply with this paragraph, such
3754 transfer shall take place pursuant to this subparagraph.

3755 b. Prior to the transfer by each interestholder of the
3756 subject accommodations and facilities, or all use rights
3757 therein, to an owners' association, any lien or other
3758 encumbrance against such accommodations and facilities, or use
3759 rights therein, shall be made subject to a nondisturbance and
3760 notice to creditors instrument pursuant to subsection (3). No
3761 transfer pursuant to this subparagraph shall become effective
3762 until the owners' association accepts such transfer and the

HB 425

2006
CS

3763 responsibilities set forth herein. An owners' association
3764 established pursuant to this subparagraph shall comply with the
3765 following provisions:

3766 (I) The owners' association shall be a business entity
3767 authorized and qualified to conduct business in this state.
3768 Control of the board of directors of the owners' association
3769 must be independent from any developer or managing entity of the
3770 timeshare plan or any interestholder.

3771 (II) The bylaws of the owners' association shall provide
3772 that the corporation may not be voluntarily dissolved without
3773 the unanimous vote of all owners of personal property timeshare
3774 interests so long as any purchaser has a right to occupy any
3775 portion of the timeshare property pursuant to the timeshare
3776 plan.

3777 (III) The owners' association shall not convey,
3778 hypothecate, mortgage, assign, lease, or otherwise transfer or
3779 encumber in any fashion any interest in or portion of the
3780 timeshare property with respect to which any purchaser has a
3781 right of use or occupancy, unless the timeshare plan is
3782 terminated pursuant to the timeshare instrument, or unless such
3783 conveyance, hypothecation, mortgage, assignment, lease,
3784 transfer, or encumbrance is approved by a vote of two-thirds of
3785 all voting interests of the association and such decision is
3786 declared by a court of competent jurisdiction to be in the best
3787 interests of the purchasers of the timeshare plan. The owners'
3788 association shall notify the division in writing within 10 days
3789 after receiving notice of the filing of any petition relating to
3790 obtaining such a court order. The division shall have standing

HB 425

2006
CS

3791 to advise the court of the division's interpretation of the
3792 statute as it relates to the petition.

3793 (IV) All purchasers of the timeshare plan shall be members
3794 of the owners' association and shall be entitled to vote on
3795 matters requiring a vote of the owners' association as provided
3796 in this chapter or the timeshare instrument. The owners'
3797 association shall act as a fiduciary to the purchasers of the
3798 timeshare plan. The articles of incorporation establishing the
3799 owners' association shall set forth the duties of the owners'
3800 association. All expenses reasonably incurred by the owners'
3801 association in the performance of its duties, together with any
3802 reasonable compensation of the officers or directors of the
3803 owners' association, shall be common expenses of the timeshare
3804 plan.

3805 (V) The documents establishing the owners' association
3806 shall constitute a part of the timeshare instrument.

3807 (VI) For owners' associations holding property in a
3808 timeshare plan located outside this state, the owners'
3809 association holding such property shall be deemed in compliance
3810 with the requirements of this subparagraph if such owners'
3811 association is authorized and qualified to conduct owners'
3812 association business under the laws of such jurisdiction and the
3813 agreement or law governing such arrangement provides
3814 substantially similar protections for the purchaser as are
3815 required in this subparagraph for owners' associations holding
3816 property in a timeshare plan in this state.

3817 (VII) The owners' association shall have appointed a
3818 registered agent in this state for service of process. In the

HB 425

2006
CS

event such a registered agent cannot be located, service of process may be made pursuant to s. 721.265.

6. Personal property subject to certificate of title.--If any personal property that is an accommodation or facility of a timeshare plan is subject to a certificate of title in this state pursuant to chapter 319 or chapter 328, the following notation must be made on such certificate of title pursuant to s. 319.27(1) or s. 328.15(1):

The further transfer or encumbrance of the property subject to this certificate of title, or any lien or encumbrance thereon, is subject to the requirements of section 721.17, Florida Statutes, and the transferee or lienor agrees to be bound by all of the obligations set forth therein.

7. If the developer has previously provided a certified copy of any document required by this paragraph, she or he may for all subsequent disbursements substitute a true and correct copy of the certified copy, provided no changes to the document have been made or are required to be made.

8. In the event that use rights relating to an accommodation or facility are transferred into a trust pursuant to subparagraph 4. or into an owners' association pursuant to subparagraph 5., all other interestholders, including the owner of the underlying fee or underlying personal property, must execute a nondisturbance and notice to creditors instrument pursuant to subsection (3).

Section 27. Paragraph (e) of subsection (1) of section 721.53, Florida Statutes, is amended to read:

HB 425

2006
CS

3847 721.53 Subordination instruments; alternate security
3848 arrangements.--

3849 (1) With respect to each accommodation or facility of a
3850 multisite timeshare plan, the developer shall provide the
3851 division with satisfactory evidence that one of the following
3852 has occurred with respect to each interestholder prior to
3853 offering the accommodation or facility as a part of the
3854 multisite timeshare plan:

3855 (e) The interestholder has transferred the subject
3856 accommodation or facility or all use rights therein to a trust
3857 that complies with this paragraph. Prior to such transfer, any
3858 lien or other encumbrance against such accommodation or facility
3859 shall be made subject to a nondisturbance and notice to
3860 creditors instrument pursuant to paragraph (a) or a
3861 subordination and notice to creditors instrument pursuant to
3862 paragraph (b). No transfer pursuant to this paragraph shall
3863 become effective until the trust accepts such transfer and the
3864 responsibilities set forth herein. A trust established pursuant
3865 to this paragraph shall comply with the following provisions:

3866 1. The trustee shall be an individual or a business entity
3867 authorized and qualified to conduct trust business in this
3868 state. Any corporation authorized to do business in this state
3869 may act as trustee in connection with a timeshare plan pursuant
3870 to this chapter. The trustee must be independent from any
3871 developer or managing entity of the timeshare plan or any
3872 interestholder of any accommodation or facility of such plan.
3873 The same trustee may hold the accommodations and facilities, or

HB 425

2006
CS

3874 use rights therein, for one or more of the component sites of
3875 the timeshare plan.

3876 2. The trust shall be irrevocable so long as any purchaser
3877 has a right to occupy any portion of the timeshare property
3878 pursuant to the timeshare plan.

3879 3. The trustee shall not convey, hypothecate, mortgage,
3880 assign, lease, or otherwise transfer or encumber in any fashion
3881 any interests in or portion of the timeshare property with
3882 respect to which any purchaser has a right of use or occupancy
3883 unless the timeshare plan is terminated pursuant to the
3884 timeshare instrument, or the timeshare property held in trust is
3885 deleted from a multisite timeshare plan pursuant to s.
3886 721.552(3), or such conveyance, hypothecation, mortgage,
3887 assignment, lease, transfer, or encumbrance is approved by vote
3888 of two-thirds of all voting interests of the timeshare plan and
3889 such decision is declared by a court of competent jurisdiction
3890 to be in the best interests of the purchasers of the timeshare
3891 plan.

3892 4. All purchasers of the timeshare plan or the owners'
3893 association of the timeshare plan shall be express beneficiaries
3894 of the trust. The trustee shall act as a fiduciary to the
3895 beneficiaries of the trust. The personal liability of the
3896 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3897 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3898 shall set forth the duties of the trustee. The trustee shall be
3899 required to furnish promptly to the division upon request a copy
3900 of the complete list of the names and addresses of the owners in
3901 the timeshare plan and a copy of any other books and records of

HB 425

2006
CS

3902 the timeshare plan required to be maintained pursuant to s.
3903 721.13 that are in the possession of the trustee. All expenses
3904 reasonably incurred by the trustee in the performance of its
3905 duties, together with any reasonable compensation of the
3906 trustee, shall be common expenses of the timeshare plan.

3907 5. The trustee shall not resign upon less than 90 days'
3908 prior written notice to the managing entity and the division. No
3909 resignation shall become effective until a substitute trustee,
3910 approved by the division, is appointed by the managing entity
3911 and accepts the appointment.

3912 6. The documents establishing the trust arrangement shall
3913 constitute a part of the timeshare instrument.

3914 7. For trusts holding property in component sites located
3915 outside this state, the trust holding such property shall be
3916 deemed in compliance with the requirements of this paragraph, if
3917 such trust is authorized and qualified to conduct trust business
3918 under the laws of such jurisdiction and the agreement or law
3919 governing such trust arrangement provides substantially similar
3920 protections for the purchaser as are required in this paragraph
3921 for trusts holding property in a component site located in this
3922 state.

3923 8. The trustee shall have appointed a registered agent in
3924 this state for service of process. In the event such a
3925 registered agent is not appointed, service of process may be
3926 served pursuant to s. 721.265.

3927 Section 28. Section 731.103, Florida Statutes, is amended
3928 to read:

HB 425

2006
CS

3929 731.103 Evidence as to death or status.--In proceedings
3930 under this code and under chapter 736, the ~~rules of evidence in~~
3931 ~~civil actions are applicable unless specifically changed by the~~
3932 ~~code.~~ The following additional rules relating to determination
3933 of death and status are applicable:

3934 (1) An authenticated copy of a death certificate issued by
3935 an official or agency of the place where the death purportedly
3936 occurred is prima facie proof of the fact, place, date, and time
3937 of death and the identity of the decedent.

3938 (2) A copy of any record or report of a governmental
3939 agency, domestic or foreign, that a person is alive, missing,
3940 detained, or, from the facts related, presumed dead is prima
3941 facie evidence of the status and of the dates, circumstances,
3942 and places disclosed by the record or report.

3943 (3) A person who is absent from the place of his or her
3944 last known domicile for a continuous period of 5 years and whose
3945 absence is not satisfactorily explained after diligent search
3946 and inquiry is presumed to be dead. The person's death is
3947 presumed to have occurred at the end of the period unless there
3948 is evidence establishing that death occurred earlier. Evidence
3949 showing that the absent person was exposed to a specific peril
3950 of death may be a sufficient basis for the court determining at
3951 any time after such exposure that he or she died less than 5
3952 years after the date on which his or her absence commenced. A
3953 petition for this determination shall be filed in the county in
3954 Florida where the decedent maintained his or her domicile or in
3955 any county of this state if the decedent was not a resident of
3956 Florida at the time his or her absence commenced.

HB 425

2006
CS

(4) This section does not preclude the establishment of death by direct or circumstantial evidence prior to expiration of the 5-year time period set forth in subsection (3).

Section 29. Section 731.1035, Florida Statutes, is created to read:

731.1035 Applicable rules of evidence.--In proceedings under this code, the rules of evidence in civil actions are applicable unless specifically changed by the code.

Section 30. Section 731.201, Florida Statutes, is amended to read:

731.201 General definitions.--Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736 ~~737~~, 738, 739, and 744, the term:

(1) "Authenticated," when referring to copies of documents or judicial proceedings required to be filed with the court under this code, means a certified copy or a copy authenticated according to the Federal Rules of Civil Procedure.

(2) "Beneficiary" means heir at law in an intestate estate and devisee in a testate estate. The term "beneficiary" does not apply to an heir at law or a devisee after that person's interest in the estate has been satisfied. In the case of a devise to an existing trust or trustee, or to a trust or trustee described by will, the trustee is a beneficiary of the estate. Except as otherwise provided in this subsection, the beneficiary of the trust is not a beneficiary of the estate of which that trust or the trustee of that trust is a beneficiary. However, if

HB 425

2006
CS

3985 each trustee is also a personal representative of the estate,
3986 each qualified beneficiary ~~the beneficiary or beneficiaries~~ of
3987 the trust as defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be
3988 regarded as a beneficiary of the estate.

3989 (3) "Child" includes a person entitled to take as a child
3990 under this code by intestate succession from the parent whose
3991 relationship is involved, and excludes any person who is only a
3992 stepchild, a foster child, a grandchild, or a more remote
3993 descendant.

3994 (4) "Claim" means a liability of the decedent, whether
3995 arising in contract, tort, or otherwise, and funeral expense.
3996 The term does not include an expense of administration or
3997 estate, inheritance, succession, or other death taxes.

3998 (5) "Clerk" means the clerk or deputy clerk of the court.

3999 (6) "Court" means the circuit court.

4000 (7) "Curator" means a person appointed by the court to
4001 take charge of the estate of a decedent until letters are
4002 issued.

4003 (8) "Devise," when used as a noun, means a testamentary
4004 disposition of real or personal property and, when used as a
4005 verb, means to dispose of real or personal property by will or
4006 trust. The term includes "gift," "give," "bequeath," "bequest,"
4007 and "legacy." A devise is subject to charges for debts,
4008 expenses, and taxes as provided in this code, the will, or the
4009 trust.

4010 (9) "Devisee" means a person designated in a will or trust
4011 to receive a devise. Except as otherwise provided in this
4012 subsection, in the case of a devise to an existing trust or

HB 425

2006
CS

4013 trustee, or to a trust or trustee of a trust described by will,
4014 the trust or trustee, rather than the beneficiaries of the
4015 trust, is the devisee. However, if each trustee is also a
4016 personal representative of the estate, each qualified
4017 beneficiary ~~the beneficiary or beneficiaries~~ of the trust as
4018 defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be regarded as a
4019 devisee.

4020 (10) "Distributee" means a person who has received estate
4021 property from a personal representative or other fiduciary other
4022 than as a creditor or purchaser. A testamentary trustee is a
4023 distributee only to the extent of distributed assets or
4024 increments to them remaining in the trustee's hands. A
4025 beneficiary of a testamentary trust to whom the trustee has
4026 distributed property received from a personal representative is
4027 a distributee. For purposes of this provision, "testamentary
4028 trustee" includes a trustee to whom assets are transferred by
4029 will, to the extent of the devised assets.

4030 (11) "Domicile" means a person's usual place of dwelling
4031 and shall be synonymous with residence.

4032 (12) "Estate" means the property of a decedent that is the
4033 subject of administration.

4034 (13) "Exempt property" means the property of a decedent's
4035 estate which is described in s. 732.402.

4036 (14) "File" means to file with the court or clerk.

4037 (15) "Foreign personal representative" means a personal
4038 representative of another state or a foreign country.

4039 (16) "Formal notice" means formal notice under the Florida
4040 Probate Rules.

HB 425

2006
CS

(17) "Grantor" means one who creates or adds to a trust and includes "settlor" or "trustor" and a testator who creates or adds to a trust.

(18) "Heirs" or "heirs at law" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(19) "Incompetent" means a minor or a person adjudicated incompetent.

(20) "Informal notice" or "notice" means informal notice under the Florida Probate Rules.

(21) "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

(22) "Letters" means authority granted by the court to the personal representative to act on behalf of the estate of the decedent and refers to what has been known as letters

HB 425

2006
CS

testamentary and letters of administration. All letters shall be designated "letters of administration."

(23) "Other state" means any state of the United States other than Florida and includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(24) "Parent" excludes any person who is only a stepparent, foster parent, or grandparent.

(25) "Personal representative" means the fiduciary appointed by the court to administer the estate and refers to what has been known as an administrator, administrator cum testamento annexo, administrator de bonis non, ancillary administrator, ancillary executor, or executor.

(26) "Petition" means a written request to the court for an order.

(27) "Power of appointment" means an authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.

(28)~~(27)~~ "Probate of will" means all steps necessary to establish the validity of a will and to admit a will to probate.

(29)~~(28)~~ "Property" means both real and personal property or any interest in it and anything that may be the subject of ownership.

(30)~~(29)~~ "Protected homestead" means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the

HB 425

2006
CS

4095 State Constitution. For purposes of the code, real property
4096 owned as tenants by the entirety is not protected homestead.
4097 (31)~~(30)~~ "Residence" means a person's place of dwelling.
4098 (32)~~(31)~~ "Residuary devise" means a devise of the assets
4099 of the estate which remain after the provision for any devise
4100 which is to be satisfied by reference to a specific property or
4101 type of property, fund, sum, or statutory amount. If the will
4102 contains no devise which is to be satisfied by reference to a
4103 specific property or type of property, fund, sum, or statutory
4104 amount, "residuary devise" or "residue" means a devise of all
4105 assets remaining after satisfying the obligations of the estate.
4106 (33)~~(32)~~ "Security" means a security as defined in s.
4107 517.021.
4108 (34)~~(33)~~ "Security interest" means a security interest as
4109 defined in s. 671.201.
4110 (35)~~(34)~~ "Trust" means an express trust, private or
4111 charitable, with additions to it, wherever and however created.
4112 It also includes a trust created or determined by a judgment or
4113 decree under which the trust is to be administered in the manner
4114 of an express trust. "Trust" excludes other constructive trusts,
4115 and it excludes resulting trusts; conservatorships; custodial
4116 arrangements pursuant to the Florida Uniform Transfers to Minors
4117 Act; business trusts providing for certificates to be issued to
4118 beneficiaries; common trust funds; land trusts under s. 689.05;
4119 trusts created by the form of the account or by the deposit
4120 agreement at a financial institution; voting trusts; security
4121 arrangements; liquidation trusts; trusts for the primary purpose
4122 of paying debts, dividends, interest, salaries, wages, profits,

HB 425

2006
CS

pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another.

(36)~~(35)~~ "Trustee" includes an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court.

(37)~~(36)~~ "Will" means an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.

Section 31. Paragraph (a) of subsection (1) and subsection (5) of section 731.303, Florida Statutes, are amended to read:

731.303 Representation.--In the administration of or in judicial proceedings involving estates of decedents or trusts, the following apply:

(1) Persons are bound by orders binding others in the following cases:

(a)1. Orders binding the sole holder or all coholders of a power of revocation or a general, special, or limited power of appointment, including one in the form of a power of amendment or revocation to the extent that the power has not become unexercisable in fact, bind all persons to the extent that their interests, as persons who may take by virtue of the exercise or nonexercise of the power, are subject to the power.

2. Subparagraph 1. does not apply to:

a. Any matter determined by the court to involve fraud or bad faith by the trustee;

b. A power of a trustee to distribute trust property; or

HB 425

2006
CS

c. A power of appointment held by a person while the person is the sole trustee.

(5) The holder of a power of appointment over property not held in trust may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. Representation under this subsection does not apply to:

(a) Any matter determined by the court to involve fraud or bad faith by the trustee;

(b) A power of a trustee to distribute trust property; or

(c) A power of appointment held by a person while the person is the sole trustee ~~When a sole holder or coholder of a general, special, or limited power of appointment, including an exercisable power of amendment or revocation over property in an estate or trust, is bound by:~~

~~(a) Agreements, waivers, consents, or approvals; or~~

~~(b) Accounts, trust accountings, or other written reports that adequately disclose matters set forth therein,~~

~~then all persons who may take by virtue of, and whose interests are subject to, the exercise or nonexercise of the power are also bound, but only to the extent of their interests which could otherwise be affected by the exercise or nonexercise of the power.~~

Section 32. Subsection (5) of section 732.2075, Florida Statutes, is amended to read:

732.2075 Sources from which elective share payable; abatement.--

HB 425

2006
CS

4179 (5) Unless otherwise provided in the trust instrument or,
4180 in the decedent's will if there is no provision in the trust
4181 instrument, any amount to be satisfied from trust property shall
4182 be paid from the assets of the trust in the order provided for
4183 claims under s. 736.05053 ~~737.3054~~(2) and (3). A direction in
4184 the decedent's will is effective only for revocable trusts.

4185 Section 33. Subsection (2) of section 732.513, Florida
4186 Statutes, is amended to read:

4187 732.513 Devises to trustee.--

4188 (2) The devise shall not be invalid for any or all of the
4189 following reasons:

4190 (a) Because the trust is amendable or revocable, or both,
4191 by any person.

4192 (b) Because the trust has been amended or revoked in part
4193 after execution of the will or a codicil to it.

4194 ~~(c) Because the trust instrument or any amendment to it~~
4195 ~~was not executed in the manner required for wills.~~

4196 (d)~~(e)~~ Because the only res of the trust is the possible
4197 expectancy of receiving, as a named beneficiary, a devise under
4198 a will or death benefits as described in s. 733.808, and even
4199 though the testator or other person has reserved any or all
4200 rights of ownership in the death benefit policy, contract, or
4201 plan, including the right to change the beneficiary.

4202 ~~(d)~~~~(e)~~ Because of any of the provisions of s. 689.075.

4203 Section 34. Section 732.603, Florida Statutes, is amended
4204 to read:

4205 (Substantial rewording of section. See
4206 s. 732.603, F.S., for present text.)

HB 425

2006
CS

4207 732.603 Antilapse; deceased devisee; class gifts.--
 4208 (1) Unless a contrary intent appears in the will, if a
 4209 devisee who is a grandparent, or a descendant of a grandparent,
 4210 of the testator:
 4211 (a) Is dead at the time of the execution of the will;
 4212 (b) Fails to survive the testator; or
 4213 (c) Is required by the will or by operation of law to be
 4214 treated as having predeceased the testator,
 4215
 4216 a substitute gift is created in the devisee's surviving
 4217 descendants who take per stirpes the property to which the
 4218 devisee would have been entitled had the devisee survived the
 4219 testator.
 4220 (2) When a power of appointment is exercised by will,
 4221 unless a contrary intent appears in the document creating the
 4222 power of appointment or in the testator's will, if an appointee
 4223 who is a grandparent, or a descendant of a grandparent, of the
 4224 donor of the power:
 4225 (a) Is dead at the time of the execution of the will or
 4226 the creation of the power;
 4227 (b) Fails to survive the testator; or
 4228 (c) Is required by the will, the document creating the
 4229 power, or by operation of law to be treated as having
 4230 predeceased the testator,
 4231
 4232 a substitute gift is created in the appointee's surviving
 4233 descendants who take per stirpes the property to which the
 4234 appointee would have been entitled had the appointee survived

HB 425

2006
CS

the testator. Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an object of a power for the object, a surviving descendant of a deceased object of a power of appointment may be substituted for the object whether or not the descendant is an object of the power.

(3) In the application of this section:

(a) Words of survivorship in a devise or appointment to an individual, such as "if he survives me," or to "my surviving children," are a sufficient indication of an intent contrary to the application of subsections (1) and (2). Words of survivorship used by the donor of the power in a power to appoint to an individual, such as the term "if he survives the donee," or in a power to appoint to the donee's "then surviving children," are a sufficient indication of an intent contrary to the application of subsection (2).

(b) The term:

1. "Appointment" includes an alternative appointment and an appointment in the form of a class gift.

2. "Appointee" includes:

a. A class member if the appointment is in the form of a class gift.

b. An individual or class member who was deceased at the time the testator executed his or her will as well as an individual or class member who was then living but who failed to survive the testator.

3. "Devise" also includes an alternative devise and a devise in the form of a class gift.

HB 425

2006
CS

4263 4. "Devisee" also includes:
4264 a. A class member if the devise is in the form of a class
4265 gift.
4266 b. An individual or class member who was deceased at the
4267 time the testator executed his or her will as well as an
4268 individual or class member who was then living but who failed to
4269 survive the testator.
4270 (4) This section applies only to outright devises and
4271 appointments. Devises and appointments in trust, including to a
4272 testamentary trust, are subject to s. 736.1106.
4273 Section 35. Section 732.604, Florida Statutes, is amended
4274 to read:
4275 732.604 Failure of testamentary provision.--
4276 (1) Except as provided in s. 732.603, if a devise other
4277 than a residuary devise fails for any reason, it becomes a part
4278 of the residue.
4279 (2) Except as provided in s. 732.603, if the residue is
4280 devised to two or more persons, the share of a residuary devisee
4281 that fails for any reason ~~and the devise to one of the residuary~~
4282 ~~devisees fails for any reason, that devise~~ passes to the other
4283 residuary devisee, or to the other residuary devisees in
4284 proportion to the ~~their~~ interests of each in the remaining part
4285 of the residue.
4286 Section 36. Section 732.611, Florida Statutes, is amended
4287 to read:
4288 732.611 Devises to multi-generation classes to be per
4289 stirpes.--Unless the will provides otherwise, all devises to

HB 425

2006
CS

4290 descendants, issue, and other multi-generation classes shall be
4291 per stirpes.

4292 Section 37. Subsection (1) of section 733.212, Florida
4293 Statutes, is amended to read:

4294 733.212 Notice of administration; filing of objections.--

4295 (1) The personal representative shall promptly serve a
4296 copy of the notice of administration on the following persons
4297 who are known to the personal representative:

4298 (a) The decedent's surviving spouse;

4299 (b) Beneficiaries;

4300 (c) The trustee of any trust described in s. 733.707(3)
4301 and each qualified beneficiary of the trust as defined in s.
4302 736.0103(14) ~~737.303(4)(b)~~, if each trustee is also a personal
4303 representative of the estate; and

4304 (d) Persons who may be entitled to exempt property

4305
4306 in the manner provided for service of formal notice, unless
4307 served under s. 733.2123. The personal representative may
4308 similarly serve a copy of the notice on any devisees under a
4309 known prior will or heirs or others who claim or may claim an
4310 interest in the estate.

4311 Section 38. Subsection (1) of section 733.602, Florida
4312 Statutes, is amended to read:

4313 733.602 General duties.--

4314 (1) A personal representative is a fiduciary who shall
4315 observe the standards of care applicable to trustees as
4316 described by part VII of chapter 736 ~~s. 737.302~~. A personal
4317 representative is under a duty to settle and distribute the

HB 425

2006
CS

4318 | estate of the decedent in accordance with the terms of the
4319 | decedent's will and this code as expeditiously and efficiently
4320 | as is consistent with the best interests of the estate. A
4321 | personal representative shall use the authority conferred by
4322 | this code, the authority in the will, if any, and the authority
4323 | of any order of the court, for the best interests of interested
4324 | persons, including creditors.

4325 | Section 39. Subsection (4) of section 733.805, Florida
4326 | Statutes, is amended to read:

4327 | 733.805 Order in which assets abate.--

4328 | (4) In determining the contribution required under s.
4329 | 733.607(2), subsections (1)-(3) of this section and s. 736.05053
4330 | ~~737.3054~~(2) shall be applied as if the beneficiaries of the
4331 | estate and the beneficiaries of a trust described in s.
4332 | 733.707(3), other than the estate or trust itself, were taking
4333 | under a common instrument.

4334 | Section 40. Paragraph (j) of subsection (1) of section
4335 | 733.817, Florida Statutes, is amended to read:

4336 | 733.817 Apportionment of estate taxes.--

4337 | (1) For purposes of this section:

4338 | (j) "Residuary devise" has the meaning set forth in s.
4339 | 731.201~~(31)~~.

4340 | Section 41. Paragraphs (a) and (f) of subsection (8) and
4341 | paragraphs (a) and (d) of subsection (9) of section 738.104,
4342 | Florida Statutes, are amended to read:

4343 | 738.104 Trustee's power to adjust.--

4344 | (8) With respect to a trust in existence on January 1,
4345 | 2003:

HB 425

2006
CS

(a) A trustee shall not have the power to adjust under this section until the statement required in subsection (9) is provided and either no objection is made or any objection which is made has been terminated.

1. An objection is made if, within 60 days after the date of the statement required in subsection (9), a super majority of the eligible ~~trust~~ beneficiaries deliver to the trustee a written objection to the application of this section to such trust. An objection shall be deemed to be delivered to the trustee on the date the objection is mailed to the mailing address listed in the notice provided in subsection (9).

2. An objection is terminated upon the earlier of the receipt of consent from a super majority of eligible ~~trust~~ beneficiaries of the class that made the objection, or the resolution of the objection pursuant to paragraph (c).

(f) The objection of a super majority of eligible beneficiaries under this subsection shall be valid for a period of 1 year after the date of the notice set forth in subsection (9). Upon expiration of the objection, the trustee may thereafter give a new notice under subsection (9).

(9)(a) A trustee of a trust in existence on January 1, 2003, that is not prohibited under subsection (3) from exercising the power to adjust shall, any time prior to initially exercising the power, provide to all eligible ~~reasonably ascertainable current~~ beneficiaries ~~described in s. 737.303(4)(b)1. and all reasonably ascertainable remainder beneficiaries described in s. 737.303(4)(b)2.~~ a statement containing the following:

HB 425

2006
CS

1. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information;

2. A statement that unless a super majority of the eligible beneficiaries objects to the application of this section to the trust within 60 days after the date the statement pursuant to this subsection was served, s. 738.104 shall apply to the trust; and

3. A statement that, if s. 738.104 applies to the trust, the trustee will have the power to adjust between income and principal and that such a power may have an effect on the distributions to such beneficiary from the trust.

(d) For purposes of subsection (8) and this subsection, the term:

1. "Eligible beneficiaries" means:

a. If at the time the determination is made there is one or more beneficiaries described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (c); or

b. If there is no beneficiary described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (b).

2. A "Super majority of the eligible ~~trust~~ beneficiaries" means:

a. If at the time the determination is made there is one or more beneficiaries described in s. 736.0103(14)(c), at least two-thirds in interest of the ~~reasonably ascertainable current~~ beneficiaries described in s. 736.0103(14)(a) ~~737.303(4)(b)1.~~ or two-thirds in interest of the ~~reasonably ascertainable remainder~~

HB 425

2006
CS

4402 beneficiaries described in s. 736.0103(14)(c) ~~737.303(4)(b)2.~~,
4403 if the interests of the beneficiaries are reasonably
4404 ascertainable; otherwise, it means two-thirds in number of
4405 either such class; or

4406 b. If there is no beneficiary described in s.
4407 736.0103(14)(c), at least two-thirds in interest of the
4408 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
4409 interest of the beneficiaries described in s. 736.0103(14)(b),
4410 if the interests of the beneficiaries are reasonably
4411 ascertainable, otherwise, two-thirds in number of either such
4412 class.

4413 Section 42. Subsection (4) of section 738.1041, Florida
4414 Statutes, is amended to read:

4415 738.1041 Total return unitrust.--

4416 (4) All determinations made pursuant to sub-subparagraph
4417 (2)(b)2.b. shall be conclusive if reasonable and made in good
4418 faith. Such determination shall be conclusively presumed to have
4419 been made reasonably and in good faith unless proven otherwise
4420 in a proceeding commenced by or on behalf of a person interested
4421 in the trust within the time provided in s. 736.1008 ~~737.307~~.
4422 The burden will be on the objecting interested party to prove
4423 that the determinations were not made reasonably and in good
4424 faith.

4425 Section 43. Subsection (5) of section 738.202, Florida
4426 Statutes, is amended to read:

4427 738.202 Distribution to residuary and remainder
4428 beneficiaries.--

HB 425

2006
CS

(5) The value of trust assets shall be determined on an asset-by-asset basis and shall be conclusive if reasonable and determined in good faith. Determinations based on appraisals performed within 2 years before or after the valuation date shall be presumed reasonable. The value of trust assets shall be conclusively presumed to be reasonable and determined in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. 736.1008 ~~737.307~~.

Section 44. Paragraph (a) of subsection (12) of section 739.102, Florida Statutes, is amended to read:

739.102 Definitions.--As used in this chapter, the term:

(12) "Trust" means:

(a) An express trust (including an honorary trust or a trust under s. 736.0408 ~~737.116~~), charitable or noncharitable, with additions thereto, whenever and however created; and

As used in this chapter, the term "trust" does not include a constructive trust or a resulting trust.

Section 45. Paragraphs (b) and (f) of subsection (6) of section 744.331, Florida Statutes, are amended to read:

744.331 Procedures to determine incapacity.--

(6) ORDER DETERMINING INCAPACITY.--If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity. A

HB 425

2006
CS

person is determined to be incapacitated only with respect to those rights specified in the order.

(b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. A guardian must be appointed to exercise the incapacitated person's delegable rights unless the court finds there is an alternative. A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward.

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief,
the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the attorney in fact. When an order is entered which determines that

HB 425

2006
CS

4484 ~~a person is incapable of exercising delegable rights, a guardian~~
4485 ~~must be appointed to exercise these rights.~~

4486 Section 46. Paragraph (a) of subsection (6) of section
4487 744.361, Florida Statutes, is amended to read:

4488 744.361 Powers and duties of guardian.--

4489 (6) A guardian who is given authority over any property of
4490 the ward shall:

4491 (a) Protect and preserve the property and invest it
4492 prudently as provided in chapter 518 defined in s. 737.302,
4493 apply it as provided in s. 744.397, and account for it
4494 faithfully.

4495 Section 47. Subsections (11) and (18) of section 744.441,
4496 Florida Statutes, are amended to read:

4497 744.441 Powers of guardian upon court approval.--After
4498 obtaining approval of the court pursuant to a petition for
4499 authorization to act, a plenary guardian of the property, or a
4500 limited guardian of the property within the powers granted by
4501 the order appointing the guardian or an approved annual or
4502 amended guardianship report, may:

4503 (11) Prosecute or defend claims or proceedings in any
4504 jurisdiction for the protection of the estate and of the
4505 guardian in the performance of his or her duties. Before
4506 authorizing a guardian to bring an action described in s.
4507 736.0207, the court shall first find that the action appears to
4508 be in the ward's best interests during the ward's probable
4509 lifetime. If the court denies a request that a guardian be
4510 authorized to bring an action described in s. 736.0207, the

HB 425

2006
CS

court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

(18) When the ward's will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust (as that term is defined in s. 736.1201 ~~737.501~~), but the maximum charitable deduction otherwise allowable will not be achieved in whole or in part, execute a codicil on the ward's behalf amending said will to obtain the maximum charitable deduction allowable without diminishing the aggregate value of the benefits of any beneficiary under such will.

Section 48. Section 744.462, Florida Statutes, is created to read:

744.462 Determination regarding alternatives to guardianship.--Any judicial determination concerning the validity of the ward's durable power of attorney, trust, or trust amendment shall be promptly reported in the guardianship proceeding by the guardian of the property. If the instrument has been judicially determined to be valid or if, after the appointment of a guardian, a petition is filed alleging that there is an alternative to guardianship which will sufficiently address the problems of the ward, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 49. Sections 737.101, 737.105, 737.106, 737.111, 737.115, 737.116, 737.201, 737.202, 737.203, 737.2035, 737.204, 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, 737.209, 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308,

HB 425

2006
CS

4539 737.309, 737.401, 737.402, 737.4025, 737.403, 737.4031,
4540 737.4032, 737.4033, 737.404, 737.405, 737.406, 737.501, 737.502,
4541 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509,
4542 737.510, 737.511, 737.512, 737.6035, 737.621, 737.622, 737.623,
4543 737.624, 737.625, 737.626, and 737.627, Florida Statutes, are
4544 repealed.

4545 Section 50. This act shall take effect July 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 451 Affordable Housing for the Elderly
SPONSOR(S): Machek and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1032

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Local Government Council	7 Y, 0 N	DiVagno	Hamby
2) Elder & Long-Term Care Committee		Walsh <i>TW</i>	Walsh <i>TW</i>
3) Transportation & Economic Development Appropriations Committee			
4) State Infrastructure Council			
5) _____			

SUMMARY ANALYSIS

The State Apartment Incentive Loan Program (SAIL) is administered by the Florida Housing Finance Corporation. The Elderly Housing Community Loan Program (EHCL) is a loan program within SAIL in which a portion of SAIL funds are reserved to loan to sponsors of housing for the elderly to provide for specific repairs and improvements.

HB 451 reduces the minimum match requirement to which a sponsor must commit in order to receive a loan under the EHCL Program from 15 percent to 5 percent of the loan amount. In the 2005 legislative session, the Legislature raised the maximum loan amount available under the EHCL Program from \$200,000 to \$750,000, which increased the potential match amount from \$30,000 to \$112,500. Reducing the minimum match rate to 5 percent would result in a maximum required match amount of \$37,500.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility and Empower Families - This bill reduces the match required by the Elderly Housing Community Loan Program (EHCL) from 15 percent to 5 percent of the loan amount received. Because the maximum loan amount was significantly increased during the last legislative session, the match required of the sponsoring agencies was also significantly increased. Reduction of the required match rate may allow more sponsors to take advantage of the higher loan amounts now available, thereby increasing and improving the stock of housing available for the low-income elderly.

B. EFFECT OF PROPOSED CHANGES:

The State Apartment Incentive Loan Program (SAIL), created in 1992, provides mortgage loans or loan guarantees to sponsors providing affordable housing to very-low income individuals.¹ SAIL is funded by the State Housing Trust Fund² and administered by the Florida Housing Finance Corporation.³

Florida Housing Finance Corporation has the authority to underwrite and make state apartment incentive loans or loan guarantees to sponsors that:

- use tax-exempt financing for the first mortgage and at least 20 percent of the units in the project are set aside for persons or families who have incomes which meet the income eligibility requirements of s. 8 of the United States Housing Act of 1937;
- use taxable financing for the first mortgage and at least 20 percent of the units in the project are set aside for persons or families who have incomes below 50 percent of the state or local median income, whichever is higher, which shall be adjusted by the corporation for family size;
- use the federal low-income housing tax credit, and the project meets the tenant income eligibility requirements of s. 42 of the Internal Revenue Code of 1986; or
- the project is located in a county that includes, or has included within the previous 5 years, an area of critical state concern designated or ratified by the Legislature for which the Legislature has declared its intent to provide affordable housing, and 100 percent of the units in the project are set aside for person or families who have income below 120 percent of the state or local median income, whichever is higher.

Section 420.5087(3), F.S., requires that a percentage of SAIL funds be reserved for each of the following groups: commercial fishing workers and farmworkers; families; persons who are homeless; and elderly persons. The percentage of SAIL funds reserved for each group is determined by using the most recent statewide very-low income rental housing market study available at the time of publication of each notice of fund availability, but the reservation of funds to commercial fishing workers and farmworkers, families, and the elderly may not be less than 10 percent of the funds available at that time. Currently 24 percent of the total SAIL funds are reserved for the elderly.⁴

Section 420.5087(3)(d), F.S., requires that 10 percent of the amount reserved for the elderly be reserved to provide loans to sponsors of housing for the elderly to provide for building preservation, health, or sanitation repairs or improvements which are required by federal, state, or local regulation or code, or lifesafety or security-related repairs or improvements to such housing. This part of the

¹ S. 420.5087, F.S.

² The State Housing Trust Fund is funded by documentary stamp tax revenues. The documentary stamp tax is applicable to all recordable instruments requiring documentary stamps according to law, unless exempt pursuant to state or federal law. Revenue from documentary stamps is divided between the General Revenue Fund and various trust funds.

³ Part V, Chapter 420, F.S.

⁴ Florida Housing Finance Corporation.

program is referred to as the Elderly Housing Community Loan Program (EHCL).⁵ Under the EHCL Program, sponsors are required to match the loan amount received at a rate of 15 percent. Funds received from matching are used to supplement the loan amount received to pay the cost of repair or improvement for which these funds are available

According to the Florida Housing Finance Corporation, the match requirement is used to leverage state funds and make more fiscally prudent investments. Prior to the increase in the available loan amount, sponsors were awarded additional points during the loan application process for exceeding the minimum match requirement by a certain percentage. With the current increased loan amount and match rate, this process is no longer being used. However, under general operating policy, sponsors are still encouraged to match at the highest percentage possible, which can exceed the minimum percentage amount set in statute.

Prior to 2005, loans under the EHCL Program were capped at \$200,000 with the requirement of a minimum match of 15 percent from the sponsor. During the 2005 legislative session, the Legislature increased the maximum loan amount from \$200,000 to \$750,000.⁶ The increase in the maximum loan amount had the practical effect of increasing the potential match requirement from \$30,000 to \$112,500. Reducing the matching requirement to 5 percent, as provided in this bill, would result in a maximum required match amount of \$37,500.

C. SECTION DIRECTORY:

Section 1. Amends s. 420.5087(3)(d), F.S., relating to the matching requirement of sponsors applying for the Elderly Housing Community Loan Program.

Section 2. Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill has no effect on state revenues.

2. Expenditures:

This bill appears to have no effect on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have an effect on local government revenue.

2. Expenditures:

This bill does not appear to have an effect on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may have an economic impact on a private sector apartment owner that qualifies under the EHCL Program by reducing the match amount required to qualify for a loan under the program, allowing them to take advantage of higher loan amounts.

⁵ See, Florida Housing Finance Corporation Rule 67-32, F.A.C.

⁶ Ch. 2005-102, L.O.F., (SB 724).

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill does not grant additional rulemaking authority for the Florida Housing Finance Corporation.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments:

A representative of the Florida Association of Homes for the Aging⁷ indicated that the bill will make the EHCL Program more attractive since most of the facilities that apply for loans under the EHCL Program are financially constrained non-profits that are financed through the Department of Housing and Urban Development (HUD) and are subject to HUD's restrictions in raising rents. The Florida Association of Homes for the Aging suggests that at the higher 15 percent match rate, many sponsors that apply for the EHCL Program are finding it difficult to make use of the higher available loan amounts and that reducing the match rate would allow more sponsors to take advantage of the higher loan amounts now available.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

⁷ Mary Ellen Early, Senior Vice President of Public Policy, Florida Association of Homes for the Aging.

HB 451

2006

1 A bill to be entitled
2 An act relating to affordable housing for the elderly;
3 amending s. 420.5087, F.S.; decreasing the match for
4 certain loan amounts required by sponsors of housing for
5 the elderly; providing an effective date.

6
7 Be It Enacted by the Legislature of the State of Florida:

8
9 Section 1. Paragraph (d) of subsection (3) of section
10 420.5087, Florida Statutes, is amended to read:

11 420.5087 State Apartment Incentive Loan Program.--There is
12 hereby created the State Apartment Incentive Loan Program for
13 the purpose of providing first, second, or other subordinated
14 mortgage loans or loan guarantees to sponsors, including for-
15 profit, nonprofit, and public entities, to provide housing
16 affordable to very-low-income persons.

17 (3) During the first 6 months of loan or loan guarantee
18 availability, program funds shall be reserved for use by
19 sponsors who provide the housing set-aside required in
20 subsection (2) for the tenant groups designated in this
21 subsection. The reservation of funds to each of these groups
22 shall be determined using the most recent statewide very-low-
23 income rental housing market study available at the time of
24 publication of each notice of fund availability required by
25 paragraph (6)(b). The reservation of funds within each notice of
26 fund availability to the tenant groups in paragraphs (a), (b),
27 and (d) may not be less than 10 percent of the funds available
28 at that time. Any increase in funding required to reach the 10-

HB 451

2006

percent minimum shall be taken from the tenant group that has the largest reservation. The reservation of funds within each notice of fund availability to the tenant group in paragraph (c) may not be less than 5 percent of the funds available at that time. The tenant groups are:

(d) Elderly persons. Ten percent of the amount reserved for the elderly shall be reserved to provide loans to sponsors of housing for the elderly for the purpose of making building preservation, health, or sanitation repairs or improvements which are required by federal, state, or local regulation or code, or lifesafety or security-related repairs or improvements to such housing. Such a loan may not exceed \$750,000 per housing community for the elderly. In order to receive the loan, the sponsor of the housing community must make a commitment to match at least 5 ~~15~~ percent of the loan amount to pay the cost of such repair or improvement. The corporation shall establish the rate of interest on the loan, which may not exceed 3 percent, and the term of the loan, which may not exceed 15 years. The term of the loan shall be established on the basis of a credit analysis of the applicant. The corporation shall establish, by rule, the procedure and criteria for receiving, evaluating, and competitively ranking all applications for loans under this paragraph. A loan application must include evidence of the first mortgagee's having reviewed and approved the sponsor's intent to apply for a loan. A nonprofit organization or sponsor may not use the proceeds of the loan to pay for administrative costs, routine maintenance, or new construction.

Section 2. This act shall take effect upon becoming a law.

HB 577

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

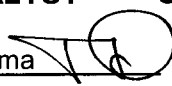
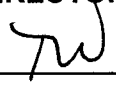
BILL #: HB 577

Medicaid Comprehensive Geriatric Fall Prevention Program

SPONSOR(S): Garcia

TIED BILLS:

IDEN./SIM. BILLS: SB 1000

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Elder & Long-Term Care Committee</u>		DePalma 	Walsh 
2) <u>Health Care Appropriations Committee</u>			
3) <u>Health & Families Council</u>			
4) _____			
5) _____			

SUMMARY ANALYSIS

House Bill 577 creates s. 409.91212, F.S., entitled the "Medicaid comprehensive geriatric fall prevention program," and directs the Agency for Health Care Administration (AHCA) to establish a Medicaid comprehensive geriatric fall prevention program in Broward and Miami-Dade Counties.

The bill requires AHCA to evaluate the cost-effectiveness and clinical effectiveness of the program before reporting its findings to the President of the Senate and the Speaker of the House of Representatives by January 1, 2009.

HB 577 provides for reimbursement on the same basis as provided for under the demonstration project contracts, although, beginning in the third year of program implementation, services are to be reimbursed only on a capitated, risk-adjusted basis.

The bill provides legislative intent for incorporation of the program into the Medicaid program, and inclusion of the program as a requirement for certification or credentialing of health plans participating in either Florida Senior Care, per s. 409.912(5), F.S., or the Medicaid managed care pilot program, per s. 409.91211, F.S.

Fiscal Impact: AHCA estimates total expenditures to be \$6,497,269 for year one, and \$6,494,659 for year two of the program. AHCA also projects year one revenues of \$3,812,078, and year two revenues of \$3,810,773, both in the form of Title XIX matching grants.

The greatest potential fiscal impact reported by AHCA is the bill's requirement to include comprehensive geriatric fall prevention services as a statutorily-mandated Medicaid program, making it available to all Medicaid recipients statewide.

See "Fiscal Analysis" for further information.

The bill provides an effective date of July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – House Bill 577 requires AHCA to establish a Medicaid comprehensive geriatric fall prevention program in Broward and Miami-Dade Counties.

Empower Families – Potentially, the fall prevention and education features of HB 577 might have the effect of enabling more Medicaid-eligible seniors to remain in community-based settings, thereby avoiding placement in various nursing and long-term care facilities, as well as decreasing reliance on more-expensive Medicaid programs.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

The Incidence and Complications of Geriatric Falls

Nationally, 12 million seniors fall each year.¹ In recent years, Florida has the 2nd highest incidence of deaths due to geriatric falls in the United States.² Statewide, there were 51,079 hospital discharges for falls involving seniors 65 and older in 2004, resulting in an average hospitalization of 5.1 days, an average charge per stay of \$28,018 and a total cost of \$1,431,148,249.³

Moreover, the frequency and severity of geriatric falls is most pronounced for seniors in nursing homes and other long-term care facilities. While roughly one-third of seniors fall annually, as many as three-fourths of nursing home residents experience fall-related injuries every year.⁴ A typical 100-bed nursing facility annually reports between 100-200 resident falls, while many other falls remain unreported.⁵

Deteriorating health conditions are partially responsible for increases in the frequency and severity of geriatric falls, as a senior's balance can be substantially affected by diabetes, heart disease, and poor circulation, or by medical complications affecting a senior's thyroid or nervous system.⁶ The likelihood of a severe fall episode is further increased through the routine administration of medicines, and the consequences of a fall are greatly exacerbated by a senior's osteoporosis, a disease which leaves the body's bones thin and brittle, and more susceptible to easy breaks – including hip fractures.⁷ Of all fall-

¹ Testimony before United States Senate Subcommittee on Aging of David W. Fleming, Acting Director of Centers for Disease Control and Prevention, June 11, 2002, available at: <http://www.cdc.gov/washington/testimony/ag061102.htm>.

² *The State of Florida Medicaid Geriatric Fall Prevention Project; Request for Proposals*, Agency for Health Care Administration, Division of Medicaid.

³ As reported by the Agency for Health Care Administration, using diagnosis codes E880 – E888.9. These figures only represent inpatient discharges, and not emergency department visits not resulting in an inpatient stay. Moreover, total costs reported do not include rehabilitatory and accompanying costs associated with a fall, and do not include other long-term consequences of fall-related injuries, such as disability, decreased productivity or reduced quality of life.

⁴ *A Tool Kit to Prevent Senior Falls: Falls in Nursing Homes*, accessed January 24, 2005, National Center for Injury Prevention and Control, Department of Health and Human Services Centers for Disease Control and Prevention, available at: <http://www.cdc.gov/ncipc/factsheets/nursing.htm>.

⁵ Ibid.

⁶ *Age Page: Preventing Falls and Fractures*, accessed January 24, 2005, National Institute on Aging, available at: http://www.niapublications.org/agepages/PDFs/Preventing_Falls_and_Fractures.pdf.

⁷ Ibid.

related fractures, hip fractures result in the greatest number of deaths and are responsible for the most diminished quality of life following recovery.⁸

In a 2002 Request for Proposals to implement a Medicaid Geriatric Fall Prevention Demonstration Project, the Agency for Health Care Administration noted that “[f]alls and their aftermath are directly correlated with the increased utilization of health care services and increased health care costs.”⁹ Among seniors age 75 and older, those experiencing a fall are four- to five-times more likely to be admitted to a long-term care facility for a period exceeding one year,¹⁰ and hospital stays are almost two times as long for elderly patients who are hospitalized after a fall than for other elders admitted for another reason.¹¹ The National Center for Injury Prevention and Control has indicated that the total cost of all fall-related injuries to seniors age 65 and older to be \$27.3 billion, and by 2020 this figure is estimated to reach \$43.8 billion nationally.¹² In Florida, the direct medical and long-term care costs associated with fall-related injuries was approximately \$1.8 billion in 2000, and the per-fall cost to seniors age 65 and older was \$10,186.¹³

Florida Injury Prevention Program for Seniors (FLIPS)

The Florida Injury Prevention Program for Seniors (FLIPS, or “the Program”) is an education and awareness initiative that focuses on preventing injuries from falls and fires. The Program is an interdepartmental, collaborative partnership effort among the Department of Elder Affairs, Department of Health and the Fire Marshal’s Office of the Department of Financial Services that coordinates with various universities, the Florida Student Nurses Association, hospitals, county health departments and many other local agencies and organizations.

Presently, the Program actively pursues “cost-avoidance activities” by conducting training workshops throughout the state, and disseminates injury prevention information to agencies serving Florida’s seniors, families, friends and caregivers through operation of its “FLIPS Clearinghouse.” Additionally, although the program itself does not provide direct services to high-risk individuals, the clearinghouse provides resources for case managers, social workers, home health care nurses and other individuals who deliver care to homebound seniors. Some of the brochures published by FLIPS include:

- “What Is FLIPS?”
- “Afraid of Falling Down? Try Tai Chi”
- “Medication & Poison for Elders”
- “Can Eating Right Prevent Falls?”

⁸ *Falls and Hip Fractures Among Older Adults*, accessed January 24, 2005, National Center for Injury Preventions and Control, Department of Health and Human Services Centers for Disease Control and Prevention, available at: <http://www.cdc.gov/ncipc/factsheets/falls.htm>.

⁹ *The State of Florida Medicaid Geriatric Fall Prevention Project; Request for Proposals*, Agency for Health Care Administration, Division of Medicaid.

¹⁰ *Falls and Hip Fractures Among Older Adults*, National Center for Injury Preventions and Control, Department of Health and Human Services Centers for Disease Control and Prevention.

¹¹ *Falls in the Elderly*, American Family Physician, American Academy of Family Physicians.

¹² *A tool kit to Prevent Senior Falls: the Costs of Fall Injuries Among Older Adults*, accessed January 24, 2005, National Center for Injury Preventions and Control, Department of Health and Human Services Centers for Disease Control and Prevention, available at: <http://www.cdc.gov/ncipc/factsheets/fallcost.htm>. The Center includes in its calculations out-of-pocket expenses and charges paid by insurance companies for the treatment of fall-related injuries, and notes that the figures do not account for the long-term consequences of fall-related injuries, such as disability, decreased productivity or reduced quality of life.

¹³ *Falls Among Older Persons and the Role of the Home: An Analysis of Cost, Incidence, and Potential Savings from Home Modification*, AARP Public Policy Institute, available at: http://assets.aarp.org/rgcenter/il/ib56_falls.pdf. The AARP notes that, in 2000, 137,954 falls requiring visits to an emergency department were observed among the approximately 2,755,000 million seniors age 65 and older in Florida.

Medicaid Geriatric Fall Prevention Demonstration Project in Broward and Miami-Dade Counties

Scope of the Demonstration Project

In September 2002, AHCA prepared a Request for Proposals to design and implement a comprehensive, multi-faceted geriatric fall prevention program to “assist community-based Medicaid beneficiaries age 65 and older that are at high risk of falling to reduce their individual risk factors to prevent falls and permit them to remain in a community-based setting.”¹⁴ AHCA further indicated that the program “should be designed to reduce the incidence, severity, and Medicaid costs associated with geriatric falls; maximize mobility; and maintain autonomy,” and the successful contract bidder should have “a thorough understanding of the Medicaid population, geriatric fall risks, and risk mitigation strategies.”¹⁵

In its Request for Proposals, AHCA detailed several possible program components to be provided by the contractor,¹⁶ including, among others:

- Developing guidelines to assist AHCA and other health professionals in their assessment of an elder’s fall risk.
- Providing fall preventive education to community-based elders at risk of fall.
- Creating a risk-screening assessment.
- Providing at-risk elders with fall prevention information, literature and education, and maintaining frequent follow-up contact with at-risk elders.
- Conducting home safety evaluations.
- Completing an individualized care plan for at-risk elders.
- Making referrals to health professionals when medical conditions or drug interactions are suspected by may be untreated.
- Working with various community organizations to organize fall prevention clinics.

Implementation of the Demonstration Project

At the direction of the Legislature,¹⁷ in Fiscal Year 2002-03 AHCA competitively procured a two-year contract (M0337) with The ElderCare Companies, Inc. to implement and coordinate operation of a Medicaid Geriatric Fall Prevention Project. The program was operational from February 19, 2003 through June 14, 2003 in Broward and Miami-Dade Counties, but was eventually terminated when funding was not appropriated by the Legislature in Fiscal Year 2003-04. Although the program was designed to serve an average monthly caseload of up to 6,000 Medicaid-eligible participants, only 2,320 seniors were actually screened. Of those that were screened, 1,984 participants were found at high risk of falling, and 1,738 received intensive services during the project’s initial three months of operation.¹⁸

The demonstration project was reinstated in 2004 with an appropriation by the Legislature.¹⁹ AHCA entered into a sole-source contact (M0509)²⁰ with The ElderCare Companies, for the period September 15, 2004 though June 30, 2006, to continue the work begun under the previous contract. Services

¹⁴ *The State of Florida Medicaid Geriatric Fall Prevention Project; Request for Proposals*, Agency for Health Care Administration, Division of Medicaid.

¹⁵ Ibid.

¹⁶ Although recommended components were supplied by the RFP, it also noted that the contractor was “encouraged to present a model fall prevention and risk reduction program that can serve as a best practice model and reflects the latest literature on best practices/programs.”

¹⁷ In the FY 2002-03 General Appropriations Act (Chapter 2002-394, L.O.F.), state General Revenue funding and federal Medicaid funding were appropriated for demonstration projects intended “to reduce geriatric falls among community-based Medicaid recipients.”

¹⁸ *Summary of Governor’s FY 2004-05 Budget Recommendations*, Agency for Health Care Administration.

¹⁹ FY 2004-05 General Appropriations Act (Chapter 2004-268, L.O.F.).

²⁰ This was a fixed price contract in the amount of \$4,824,000 per year to serve 6,000 Medicaid eligible elders, at an average cost of \$804 per recipient per year.

were again provided to more than 6,000 Medicaid-eligible seniors²¹ broadly representative of the Medicaid population of Broward and Miami-Dade Counties, and some preliminary analyses of outcomes were conducted. The services provided by the project to these elders included:

- Conducting multi-phase fall risk assessments.
- Coordinating hundreds of group fall prevention workshops at housing complexes, churches and social service agencies.
- Mailing 12 "safety-grams" per year to each participant.
- Placing 12 reassurance and research telephone calls per year to each participant.
- Holding several nutrition and exercise workshops.
- Communicating the results of risk-screening assessments to all participants through initial mailings.
- Providing to patients' physicians the following: (1) a client review, (2) case planning documents and, (3) notification of the availability of visiting fall prevention experts in Broward and Miami-Dade Counties.
- Providing post-fall counseling, fear-of-fall counseling, and fall prevention workbooks in several different languages, including English, Spanish, Creole and Russian.

However, in June 2005 the appropriation necessary for continuation of the demonstration project was vetoed by the Governor, and the contract was terminated.

Results of the Demonstration Project and Potential Program Savings

The ElderCare Companies submitted results from its Medicaid geriatric fall prevention demonstration project to AHCA for review, following confirmation by vendors and subcontractors, and subject to an independent CPA audit.²²

The ElderCare Companies reported measuring the clinical effectiveness and savings achieved by the fall prevention demonstration project through a "multi-method validation study" that equally weighted treatment and control groups. From January 2003 through June 2005, The ElderCare Companies reported the following figures versus proportionate mirror control groups:

- 54% reduction in hospitalizations due to fall-related fractures.
- 63% reduction in nursing home stays following an injurious fall.
- 60% reduction in long-term care costs, per case.
- 57% reduction in overall hospitalizations following an injurious fall.
- 21% reduction in hospitalization costs, per case.
- 35% reduction in inpatient rehabilitation costs.

EFFECT OF PROPOSED CHANGES

HB 577 creates s. 409.91212, F.S., entitled "Medicaid comprehensive geriatric fall prevention program", requiring AHCA to establish a Medicaid comprehensive geriatric fall prevention program in Broward and Miami-Dade Counties. The program, intended to expand upon the geriatric fall prevention demonstration project developed under state contracts awarded by AHCA in fiscal year 2003-04, shall be evidence-based, serve 8,000 Medicaid recipients age 60 and older during the first year of operation, and be in operation within 120 days of the act's effective date.

The bill requires AHCA to evaluate the cost-effectiveness and clinical effectiveness of the program in a report submitted to the President of the Senate and the Speaker of the House of Representatives by January 1, 2009. If such report indicates the program is cost-effective and clinically effective, it shall

²¹ 6,702 Medicaid elders were recruited for the reinstated demonstration project, while 6,564 Medicaid-eligible seniors received multi-phase fall risk assessments.

²² *A Comprehensive Geriatric Fall Prevention Program for All of Florida Medicaid's Community-Resident Elders: Establishing a Statewide, Permanent, Single-Vendor System*, August 2005, The ElderCare Companies, Inc.

also include a plan and timetable to statewide implementation. AHCA is required to consider findings from program evaluations and site visit reports of the demonstration project while evaluating the program's cost-effectiveness and clinical effectiveness.

The bill provides for reimbursement of services on the same basis as provided for under previous demonstration project contracts (M0337 and M0509) although, beginning on the first day of operation in the third year of program implementation, services are to be reimbursed only on a capitated, risk-adjusted basis.

HB 577 provides legislative intent for the Medicaid comprehensive geriatric fall prevention program's incorporation into the Medicaid program, and its inclusion by AHCA as a requirement for the certification or credentialing of any health plan to participate in the integrated, fixed-payment delivery system for Medicaid recipients 60 or older (Florida Senior Care)²³ or the certification or credentialing of any health plan participating in the Medicaid managed care pilot program²⁴ that enrolls Medicaid recipients who are at risk for experiencing a geriatric fall.

The bill provides an effective date of July 1, 2006.

C. SECTION DIRECTORY:

Section 1. Creates s. 409.91212, F.S., entitled "Medicaid comprehensive geriatric fall prevention program"; directs the Agency for Health Care Administration to establish a Medicaid comprehensive geriatric fall prevention program in Broward and Miami-Dade Counties; indicates such program shall expand a separate demonstration project; directs the agency to evaluate and report on the cost-effectiveness and clinical effectiveness of the program by January 1, 2009; provides guidelines for reimbursement; provides legislative intent for incorporation of the program into the Medicaid program and inclusion of the program as a requirement for certification or credentialing of participants in Florida Senior Care and the Medicaid managed care pilot program.

Section 2. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

AHCA reports the following revenues:

	<u>Amount in Year 1 (FY 06-07)</u>	<u>Amount in Year 2 (FY 07-08)</u>
<u>Non-Recurring Revenues:</u>	\$0	\$0
<u>Recurring Revenues:</u>		
Title XIX Matching Grants	\$3,812,078	\$3,810,773
Total Recurring Revenues:	\$0	\$0
Total Non-Recurring Revenues:	\$3,812,078	\$3,810,773
Total Revenues:	\$3,812,078	\$3,810,773

²³ S. 409.912(5), F.S.

²⁴ S. 409.912111, F.S.

2. Expenditures:

AHCA advises that:

The bill authorizes the provision of fall-prevention services to 8,000 Medicaid recipients during the first year of operation at a rate of \$804 per person or \$6,432,000. The rate per person is based on the bill's requirement that services provided be paid as in the previous demonstration contracts (M0337 and M0509). Beyond the first year, the bill does not provide the number of persons to be served but does require that the same rate per person be continued the second year. The third year, the bill requires services be reimbursed only on a capitated, risk-adjusted basis, although no specific information was provided regarding what that rate would be or how the risk-adjustment would be determined.

Other expenditures during the first year include the cost of one full-time program analyst (pay grade 24) position at AHCA to develop and manage the procurement process and provide contract management services, including monitoring contract requirements.

An evaluation by the Agency of the cost-effectiveness and clinical effectiveness of the comprehensive geriatric fall-prevention program is required with a report to the President of the Senate and Speaker of the House by January 1, 2009. The report is to include a plan and timetable for statewide implementation, if findings of the evaluation indicate that the program is cost-effective and clinically effective. The Agency is further required to consider findings from previous evaluations and site-visits conducted under the earlier contracts, implying a multi-year evaluation. This evaluation would be completed by an independent entity and require procurement and contract management activities.

The bill does not provide sufficient information to determine the scope of work required to conduct the evaluation, the number of years the evaluation should encompass, or the number of subjects to be evaluated and, as a consequence, it is difficult to estimate the cost of the evaluation. During the first year, however, an estimate is projected to cover the cost of developing the scope of work, identifying the variables to be measured, projecting the number of subjects to be evaluated, and defining the methods to be employed to determine cost-effectiveness and clinical effectiveness.

Beyond the first year of implementation, costs are difficult to project as the bill does not contain adequate information to determine the number of persons to be served nor is information available to estimate the cost of the required evaluation. One FTE at the Agency would be required throughout the implementation and contract period to undertake contract management and monitoring activities.

The greatest potential fiscal impact on AHCA is the bill's requirement to include comprehensive geriatric fall-prevention services as a statutorily-mandated Medicaid program making it available statewide to all Medicaid recipients. Potentially, hundreds of thousands of Floridians could be eligible for these services at a cost of \$200 to \$300 million per year (based on an estimate of the number of persons who are community-dwelling, Medicaid eligible, 60 years and older: 340,000 individuals at a cost of \$800 per person per year.)

Amount in Year 1 (FY 06-07)

Amount in Year 2 (FY 07-08)

Non-Recurring Expenses:

Professional Staff

\$2,610

\$0

Recurring Expenses:

Salaries

Medical/Health Care Program Analyst (Pay Grade 24)	\$51,326	\$51,326
Expenses		
Professional Staff	\$10,940	\$10,940
Human Resources Services		
Full-time Employee Positions	\$393	\$393
Special Categories		
Geriatric Fall Prevention Services	\$6,432,000	\$6,432,000
Total Recurring Expenditures:	\$6,494,659	\$6,494,659
Total Non-Recurring Expenditures	\$2,610	\$0
Total Expenditures	\$6,497,269	\$6,494,659
<u>Funding of Expenditures:</u>		
General Revenue Fund (41.24%)	\$2,685,191	\$2,683,886
Medical Care Trust Fund (58.17%)	\$3,779,443	\$3,779,443
Administrative Trust Fund (.50%)	\$32,635	\$31,330

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

HB 577 apparently requires AHCA to contract with one or more private entities to reestablish a Medicaid comprehensive geriatric fall prevention program in Broward and Miami-Dade Counties, in a manner consistent with previous geriatric fall prevention demonstration projects developed under state contracts awarded by AHCA in Fiscal Year 2003-04.

D. FISCAL COMMENTS:

The only state estimate of cost savings generated through the demonstration project is contained in the Summary of Governor's FY 2004-05 Budget Recommendations. In this document, AHCA projected that implementation of the demonstration project would produce \$1,048,900 in general Medicaid cost savings, and an additional \$5,872,900 in savings from nursing home cost avoidance. This represented a gross savings of \$6,921,800.

Overall, The ElderCare Companies reported that, for the period of January 2003 through June 2005, the demonstration project saved the state \$17,445,240 on an initial investment of \$7,236,000, for a rate of return of \$2.41 for every \$1 invested in the project and a total net savings to Florida Medicaid of \$10,210,000.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Counties and municipalities are unaffected by this legislation.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

AHCA raises several points of concern in their analysis of HB 577. First, the agency notes that it is unclear whether the bill requires AHCA to competitively procure the Medicaid comprehensive geriatric fall prevention program, or whether the agency is simply required to award a sole-source contract to the previous contractor. The agency notes that, if it is to competitively procure this program, it may prove difficult to have the program fully operational within the 120 days mandated by the legislation.

Moreover, AHCA reports being unclear of the need for altering the reimbursement schedule, beginning in the program's third year of operation, to a "capitated, risk-adjusted" calculation. The agency notes it is unsure "what services the contractor would be at risk for, as the only service provided is geriatric fall prevention." Similarly, the Department of Elder Affairs (DOEA) notes that the reimbursement schedule provided in the bill, which currently states reimbursement shall "be on the same basis as provided for under the demonstration project contracts described in subsection (1)," would be clarified through inclusion of the exact reimbursement rates contained in the previous demonstration project contracts.

As previously noted, AHCA reports the bill does not provide sufficient information to determine the scope of work required to conduct the required evaluation of the program's cost-effectiveness and clinical effectiveness, the number of years such evaluation should encompass, or the number of subjects to be evaluated.

AHCA also notes that, pursuant to the terms of the Medicaid Managed Care Pilot Program, as authorized by s. 409.91211, F.S., managed care plans may offer customized benefit packages to enrolled recipients and such packages must include those mandatory and optional services set forth in s. 409.905, F.S., and s. 409.906, F.S. There is nothing in s. 409.91211, F.S. that requires providers participating in the Medicaid Managed Care Pilot Program to offer geriatric fall prevention services. However, AHCA points out, HB 577 requires that the geriatric fall prevention program be available to recipients enrolled in health plans operated under s. 409.91211, F.S. Accordingly, AHCA believes that s. 409.91211, as well as the 1115 Waiver approved by the Centers for Medicare and Medicaid Services (CMS) authorized by the Managed Care Pilot Program, would need to be amended in order to include geriatric fall prevention services.

Additionally, the legislation requires that the geriatric fall prevention program be available to recipients enrolled in health plans operated under s. 409.912(5), F.S. (Florida Senior Care). At present, AHCA points out, geriatric fall prevention services are not included in the list of mandatory or optional services available through such integrated, fixed-payment delivery system for Medicaid recipients age 60 and older. Moreover, DOEA points out that AHCA and DOEA are not required in s. 409.912(5), F.S. to certify and credential health plans, as referenced in the bill, but rather are charged to "use a competitive procurement process to select entities to operate the integrated program."²⁵ DOEA recommends that

²⁵ S. 409.912(5)(b), F.S., noting that "[e]ntities eligible to submit bids include managed care organizations licensed under chapter 641, including entities eligible to participate in the nursing home diversion program, other qualified providers as

this language would be more appropriate in the context of s. 409.912(5), F.S., if it created the requirement that the geriatric falls prevention program be a necessary component of the selection criteria for providers in the integrated, fixed-payment delivery system.

Finally, s. 1902(a)(23) of the Social Security Act²⁶ provides that an individual may receive Medicaid services from any qualified provider willing to furnish such services. However, AHCA notes that the language of the bill is unclear as to whether recipients may freely choose a provider from which to receive certain geriatric fall prevention services. The bill only references an expansion of previously-awarded demonstration project contracts, and does not specify whether the geriatric fall prevention program may be provided through sources other than those with whom the agency previously contracted. At present, the Managed Care Pilot Program authorized by CMS permits the state to waive the requirements of s. 1902(a)(23) under certain circumstances. However, those circumstances do not currently include the provision of geriatric fall prevention services. Accordingly, AHCA reports it may need to seek additional waiver authority in order to implement a Medicaid comprehensive geriatric fall prevention program.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

defined in s. 430.703(7), F.S., community care for the elderly lead agencies, and other state-certified community service networks that meet comparable standards as defined by the agency, in consultation with the Department of Elderly Affairs and the Office of Insurance Regulation, to be financially solvent and able to take on financial risk for managed care.”

²⁶ 42 U.S.C.A. § 1396a.

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PAGE: 10

HB 577

2006

A bill to be entitled

An act relating to a Medicaid comprehensive geriatric fall prevention program; creating s. 409.91212, F.S.; requiring the Agency for Health Care Administration to establish a Medicaid comprehensive geriatric fall prevention program; directing the agency to develop the program as an expansion of a certain pilot project conducted in Broward and Miami-Dade Counties; requiring the agency to evaluate the program and report to the Legislature; requiring a plan and timetable for statewide implementation contingent upon certain findings; specifying a timeframe for implementing a certain form of reimbursement; providing legislative intent; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 409.91212, Florida Statutes, is created to read:

409.91212 Medicaid comprehensive geriatric fall prevention program.--

(1)(a) The Agency for Health Care Administration shall establish a Medicaid comprehensive geriatric fall prevention program in Broward and Miami-Dade Counties. The program shall be evidence based and shall expand the geriatric fall prevention demonstration project developed under state contracts M0337 and M0509 that were awarded by the agency in fiscal year 2003-2004. The program shall serve 8,000 Medicaid recipients 60 years of

HB 577

2006

age or older during the first year of operation and shall be in operation within 120 days after the effective date of this act.

(b) The agency shall evaluate the cost-effectiveness and clinical effectiveness of the program and report its findings to the President of the Senate and the Speaker of the House of Representatives by January 1, 2009. If the findings indicate the program is cost-effective and clinically effective, the report shall include a plan and timetable for statewide implementation. In evaluating the cost-effectiveness and clinical effectiveness of the program, the agency must consider findings from program evaluations and site visit reports relating to the demonstration project described in paragraph (a).

(2) Services provided under subsection (1) shall be reimbursed on the same basis as provided for under the demonstration project contracts described in subsection (1). Beginning on the first day of operation in the third year of program implementation, as authorized under this section, services shall be reimbursed only on a capitated, risk-adjusted basis.

(3) It is the intent of the Legislature that the Medicaid comprehensive geriatric fall prevention program authorized by this section be incorporated into the Medicaid program, as provided under ss. 409.901-409.920, and included by the agency as a requirement for the certification or credentialing of any health plan to participate in the integrated, fixed-payment delivery system for Medicaid recipients who are 60 years of age or older as established in s. 409.912(5) and in the certification or credentialing of any health plan participating

HB 577

2006

56 | in the Medicaid managed care pilot program as established in s.
57 | 409.91211 that enrolls Medicaid recipients who are at risk for
58 | geriatric falls.

59 | Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB ELT 06-01 Continuation of a moratorium on the approval of certificates of need for additional community nursing home beds
SPONSOR(S): Elder & Long-Term Care Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 790

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Elder & Long-Term Care Committee		Walsh <i>TW</i>	Walsh <i>TW</i>
1) _____	_____	_____	_____
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

PCB ELT-06-01 proposes to extend the moratorium on approval of certificates of need for nursing homes until July 1, 2011. The PCB provides an exception to the moratorium for nursing homes with a 96 percent occupancy rate and a record of providing good quality care in an AHCA planning subdistrict where the occupancy rate is 94 percent or above.

The PCB allows a nursing home located in a county where the Nursing Home Diversion program or Florida Senior Care has been implemented to request a reduction in its annual Medicaid patient days that is a condition of its certificate of need until June 30, 2011.

The PCB relocates the sections on the CON moratorium from those statutes dealing with continuing care contracts to those dealing with certificate of need review.

The PCB provides it is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government --- If a nursing home meets the criteria for the exception from the CON moratorium, it will be able to apply for an exemption from CON review for the addition of nursing home beds and thus will not incur the cost of a CON review.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

During its 2001 session, the Legislature enacted CS/CS/CS/SB 1202,¹ which contained numerous provisions relating to long-term care facilities in Florida. In addition to other requirements, the bill required that notwithstanding the establishment of need as provided for in chapter 408, no certificate of need (CON) for additional community nursing home beds was to be approved by the Agency for Health Care Administration (AHCA) until July 1, 2006. The bill also provided legislative findings that

[T]he continued growth in the Medicaid budget for nursing home care had constrained the ability of the state to meet the needs of its elderly residents through the use of less restrictive and less institutional methods of long-term care. It is therefore the intent of the Legislature to limit the increase in Medicaid nursing home expenditures in order to provide funds to invest in long-term care that is community-based and provides supportive services in a manner that is both more cost-effective and more in keeping with the wishes of the elderly residents of the state.²

Certificate of Need History

The Certificate of Need (CON) is a regulatory review process administered by AHCA which requires specified health care providers to obtain prior authorization before offering certain new or expanded services. Florida's CON program has been in operation since July 1973 and has undergone several changes over the years.

From 1974 through 1986, the specifics of the program were largely dictated by the federal National Health Planning and Resources Development Act, which established minimum requirements regarding the type of services subject to CON review, review procedures, and review criteria. Each state was required to have a CON program in compliance with those standards as a condition for obtaining federal funds for health programs. The federal health planning legislation was repealed in 1986.

Since 1987, Florida's Certificate of Need formula for community nursing home beds³ provides an allocation of projected nursing home beds which will be needed in a specific AHCA CON subdistrict within a three-year time horizon. The formula considers the projected increase in the district population age 65 to 74 and age 75 and over, with the age group 75 and over given 6 times more weight in projecting the population increase. Projected future demand is adjusted by the number of existing and currently allocated beds and occupancy rates, producing a net need for additional nursing facility beds. Rules governing certificate of need provide that if current occupancy of licensed nursing home beds is

¹ Chapter 2001-45, L.O.F.

² S. 651.1185(2), F.S.

³ See Chapter 59C-1.036, F.A.C.

less than 85 percent, the net need in a subdistrict is zero regardless of whether the formula otherwise would show a net need.

Prior to July 2001, projects to increase the number of community nursing home beds by construction of new facilities or addition to existing facilities required CON approval. Pursuant to statute, beginning July 2001 and continuing until July 2006, AHCA is prohibited from approving any project that would add to the total of community nursing home beds in any subdistrict. The prohibition does not apply to sheltered nursing home beds.⁴ Projects which increase beds at one nursing home with an identical decrease at another facility in the same subdistrict may be approved, because the subdistrict total would not change.

Subsequent Legislative Modifications to Moratorium

There have been two modifications to the moratorium since 2001:

- Section 651.1185(4)(a), F.S. permits beds to be added in a county which currently has no community nursing home beds and the lack of beds occurs because all nursing homes in that county that were licensed on July 1, 2001 have closed.
- Section 651.1185(5), F.S. specifies that the moratorium does not apply in a county under 50,000 population. In such counties a nursing home may add up to ten beds or increase its beds by 10 percent, whichever is greater. In addition to other documentation, the facility must:
 - Certify that the facility has not had any class I or class II deficiencies within the 30 months preceding the request for additional beds.
 - Certify that the prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and the facility had not had any class I or class II deficiencies since its initial licensure.
 - For a facility that has been licensed for less than 24 months, certify that the prior 6-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and that the facility has not had any class I or class II deficiencies since its initial licensure (s. 651.1185(5), F.S.).

Despite enactment of these exceptions, no expansion of nursing home beds has occurred since the moratorium was imposed.

Has the Nursing Home CON Moratorium Affected Access to Nursing Home Care?

After enactment of the moratorium, many believed that due to Florida's growing elder population, the state would experience a substantial increase in nursing home occupancy rates which would likely require an expansion of the number of nursing home beds. However, Florida's statewide nursing home occupancy rate in 2001 was 89.25 percent, and this occupancy rate has declined to a statewide occupancy rate for the year ending June 2005 of 87.41 percent.⁵ The national occupancy rate was 82.4 percent in 2002, the latest year for which national data is available.⁶ Occupancy rates in other states vary from a high of 94.1 percent in North Dakota, to a low of 68.4 percent in Oklahoma.⁷

The absence of a substantial increase in occupancy rate may be due to a number of factors:

⁴ S. 651.1185(3), F.S. Sheltered beds are those which are a part of a continuing care retirement community.

⁵ Source: Agency for Health Care Administration, Bill Analysis, January 23, 2006.

⁶ Source: Table 113, *Nursing Home Beds, occupancy, and residents, according to geographic division and State: United States, 1995-2002*. National Center for Health Statistics. *Health, United States 2004 with Chartbook on Trends in the Health of Americans*. Hyattsville, Maryland: 2004. Available at <http://www.cdc.gov/nchs/fastats/nursingh.htm>.

⁷ *Ibid.* According to Table 113, Florida's nursing home occupancy rate in 2002 was 85.6 percent.

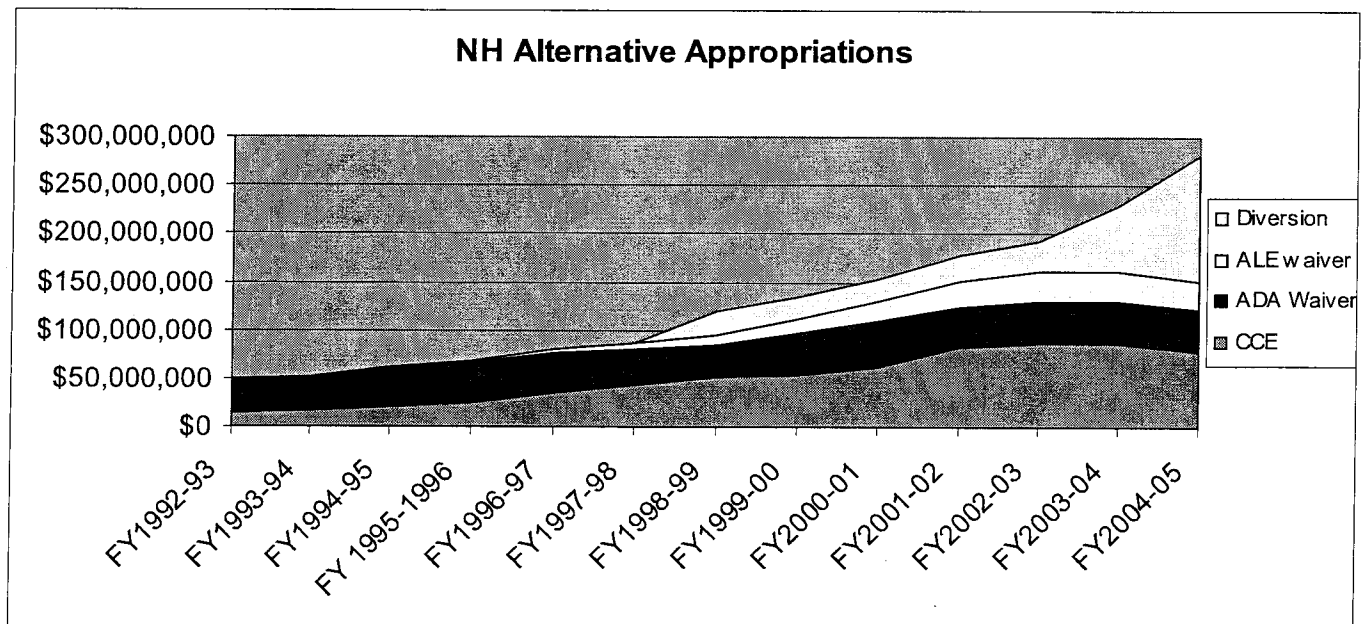
- Florida has increased its investment in home and community-based alternatives, particularly those programs targeted to the frailest seniors
- Florida contains a robust assisted living industry. Many elderly persons prefer assisted living to placement in medically-oriented nursing homes.
- Increasing disability levels of individuals served in nursing homes suggests that those who are less disabled are being cared for in other settings.
- Most recent studies indicate a decline in the rate of functional disability among the U.S. elderly population. Although rates of disability declined for both sexes, the most significant decline in disability is among men, with the largest decline in disability being in men over the age of 80.⁸

Nonetheless, there are four areas in Florida where occupancy rates surpass the 94 percent occupancy threshold in the CON formula; each demonstrates a net bed need.

County	Net Bed Need
Leon	68
Columbia, Hamilton and Suwanee	70
Nassau/North Duval	30
Seminole	111

Resources Devoted to Home and Community-based Services

CS/CS/CS/SB1202 provided that the intent in limiting the growth in new nursing home beds was to increase investments in community-based long term care.⁹ The chart below is the Appropriations history for Florida's four largest Home and Community-based programs serving the elderly: the Nursing Home Diversion Program, the Assisted Living for the Elderly Waiver, the Aging/Disabled Waiver, and the Community Care for the Elderly program:



⁸ Costa, Dora L., 2002. "Changing Chronic Disease Rates and Long-term Declines in Functional Limitation Among Older Men." *Demography*. 39(1): 119-138.

⁹ See fn. 1, *infra*.

Nursing Home Industry Recommendations Regarding the Moratorium

Representatives of the Florida Health Care Association (representing primarily for-profit nursing homes), the Florida Association of Homes for the Aging (representing primarily not for profit and religious nursing homes) and the Florida Long-Term Health Care Association (representing primarily for profit nursing home chains) report that members of their associations do not see a need to lift the moratorium at this time. All of the associations cautioned that future projections of Florida's elder population suggest that at some point there will be an increased demand for nursing home services.

Nursing home representatives recommended that, due to the lag time in nursing home construction and difficulty obtaining capital for construction, the state should continue to monitor potential demand and structure lifting of the moratorium sufficiently in advance of projected need. All of the provider associations suggested that there will be a likelihood that some counties or CON subdistricts may experience local population growth which may create the need for a localized exception to the moratorium. In the nursing home industry, normal turnover produces a slight vacancy rate, meaning that a facility with a 95 percent occupancy rate is, for practical purposes, full. Industry representatives suggested the state should provide an exception to the moratorium in the instance that the average occupancy rate in facilities in a CON subdistrict exceeds 96 percent for a specified period of time.

In addition, many Florida nursing homes operate with CON conditions that specify a certain number of Medicaid patient days the facility must serve. The increased investments in community-based long-term care --- leading to a decrease in placements in nursing homes --- have resulted in some facilities needing to request a reduction in those CON conditions. These reviews are time consuming for both the licensee and AHCA. As the Nursing Home Diversion program continues to expand¹⁰ and Medicaid long-term care reform is implemented,¹¹ the necessity for these reviews will increase.

PROPOSED CHANGES

PCB ELT-06-01 proposes to extend the moratorium on approval of certificates of need for nursing homes until July 1, 2011. The PCB provides an exception to the moratorium. In an AHCA planning subdistrict where the nursing home occupancy rate is 94 percent or greater, a nursing home with a 96 percent or greater occupancy rate could add ten beds or 10 percent of the number of licensed beds, if the home had no class I or class II deficiencies in the past 30 months, and if any beds licensed before the exception was requested had been licensed and operational for at least 12 months. A nursing home may request additional beds under this exception as an exemption from full comparative review.

The PCB allows a nursing home located in a county where the Nursing Home Diversion program or Florida Senior Care has been implemented to request a reduction in its annual Medicaid patient days that is a condition of its certificate of need until June 30, 2011. AHCA is required to automatically grant the request if the reduction is no more than 15 percent of the nursing home's annual condition. A nursing home may make only one request every two years and must make such request in writing 60 days in advance of making a reduction. The revised CON condition must be changed in the record and acknowledged in writing by the agency.

The PCB relocates the sections on the nursing home CON moratorium from those statutes dealing with continuing care contracts to those dealing with certificate of need review for ease of use. This bill amends s. 651.1185, F.S., transfers that section, and renumbers it as s. 408.0435, F.S., and amends s.408.040, F.S.

¹⁰ Forty nine counties are approved for operation of nursing home diversion programs; 25 of those counties have active programs.

¹¹ Two pilot areas have been designated to implement Florida Senior Care, an integrated, fixed-payment delivery system for Medicaid recipients age 60 or older. One area --- Osceola, Orange, Seminole, and Brevard counties --- is to provide voluntary participation; the other --- Escambia, Santa Rosa, Okaloosa, and Walton counties--- is mandatory.

C. SECTION DIRECTORY:

Section 1. Transfers s. 651.1185, F.S., and renumbers and amends it as s. 408.0435, F.S.; extends moratorium on nursing home CON until July 1, 2011; provides exceptions to moratorium.

Section 2. Amends s. 408.040(1), F.S.; provides for reduction in patient days as condition of CON in certain areas under certain conditions.

Section 3. Provides the act is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

If a nursing home meets the criteria for the exception from the CON moratorium, it will be able to apply for an exemption from CON review for the addition of nursing home beds and thus will not incur the cost of a CON review.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The PCB does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds, reduce the percentage of a state tax shared with counties or municipalities, or reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

BILL

ORIGINAL

YEAR
CS

1 A bill to be entitled
2 An act relating to certificates of need; transferring,
3 renumbering, and amending s. 651.1185, F.S.; extending the
4 moratorium on certificates of need for additional
5 community nursing home beds until July 1, 2011; specifying
6 nonapplication of a moratorium for the addition of nursing
7 home beds in certain specified facilities; providing
8 requirements and limitations; providing for repeal upon
9 expiration of the moratorium; amending s. 408.040, F.S.;
10 authorizing nursing homes in certain counties to request a
11 reduction in their annual Medicaid patient days; requiring
12 the Agency for Health Care Administration to automatically
13 grant such a request if the nursing home meets certain
14 conditions; providing for future repeal; providing an
15 effective date.

16
17 Be It Enacted by the Legislature of the State of Florida:

18
19 Section 1. Section 651.1185, Florida Statutes, is
20 transferred, renumbered as section 408.0435, Florida Statutes,
21 and amended to read:

22 408.0435 ~~651.1185~~ Moratorium on nursing home certificates
23 of need.--

24 (1) Notwithstanding the establishment of need as provided
25 for in this chapter ~~408~~, a ~~no~~ certificate of need for additional
26 community nursing home beds may not ~~shall~~ be approved by the
27 agency until July 1, 2011 ~~2006~~.

BILL

ORIGINAL

YEAR
CS

28 (2) The Legislature finds that the continued growth in the
29 Medicaid budget for nursing home care has constrained the
30 ability of the state to meet the needs of its elderly residents
31 through the use of less restrictive and less institutional
32 methods of long-term care. It is therefore the intent of the
33 Legislature to limit the increase in Medicaid nursing home
34 expenditures in order to provide funds to invest in long-term
35 care that is community-based and provides supportive services in
36 a manner that is both more cost-effective and more in keeping
37 with the wishes of the elderly residents of this state.

38 (3) This moratorium on certificates of need shall not
39 apply to sheltered nursing home beds in a continuing care
40 retirement community certified by the former Department of
41 Insurance or by the Office of Insurance Regulation pursuant to
42 chapter 651.

43 (4)(a) The moratorium on certificates of need does not
44 apply and a certificate of need for additional community nursing
45 home beds may be approved for a county that meets the following
46 circumstances:

- 47 1. The county has no community nursing home beds; and
48 2. The lack of community nursing home beds occurs because
49 all nursing home beds in the county that were licensed on July
50 1, 2001, have subsequently closed.

51 (b) The certificate-of-need review for such circumstances
52 shall be subject to the comparative review process consistent
53 with the provisions of s. 408.039, and the number of beds may
54 not exceed the number of beds lost by the county after July 1,
55 2001.

BILL

ORIGINAL

YEAR
CS

56
57 This subsection shall be repealed upon the expiration of the
58 moratorium established in subsection (1).

59 (5) The moratorium on certificates of need does not apply
60 for the addition of nursing home beds licensed under chapter 400
61 to a nursing home located in a county having up to 50,000
62 residents, in a number not exceeding 10 total beds or 10 percent
63 of the number of beds licensed in the facility being expanded,
64 whichever is greater. In addition to any other documentation
65 required by the agency, a request submitted under this
66 subsection must:

67 (a) Certify that the facility has not had any class I or
68 class II deficiencies within the 30 months preceding the request
69 for addition.

70 (b) Certify that the prior 12-month average occupancy rate
71 for the nursing home beds at the facility meets or exceeds 94
72 percent and the facility had not had any class I or class II
73 deficiencies since its initial licensure.

74 (c) For a facility that has been licensed for less than 24
75 months, certify that the prior 6-month average occupancy rate
76 for the nursing home beds at the facility meets or exceeds 94
77 percent and that the facility has not had any class I or class
78 II deficiencies since its initial licensure.

79
80 This subsection shall be repealed upon the expiration of the
81 moratorium established in subsection (1).

82 (6) The moratorium on certificates of need does not apply
83 for the addition of nursing home beds licensed under chapter 400

BILL

ORIGINAL

YEAR
CS

84 in a number not exceeding 10 total beds or 10 percent of the
85 number of beds licensed in the facility being expanded,
86 whichever is greater, if the facility meets the requirements of
87 paragraph (a).

88 (a) In addition to any other documentation required by the
89 agency, a request for the addition of beds under this subsection
90 must certify that:

91 1. The facility has not had any class I or class II
92 deficiencies within the 30 months preceding the request for
93 addition;

94 2. The prior 12-month average occupancy rate for the
95 nursing home beds at the facility meets or exceeds 96 percent;

96 3. The occupancy rate for nursing home beds in the
97 subdistrict is 94 percent or greater; and

98 4. Any beds authorized for the facility under this
99 subsection before the date of the current request for additional
100 beds have been licensed and operational for at least 12 months.

101 (b) A nursing home may request additional beds under this
102 subsection as an exemption from the provisions of s. 408.036(1).
103 The timeframes and monitoring process specified in s.
104 408.040(2)(a)-(c) apply to any exemption issued under this
105 subsection.

106 (c) The agency shall count beds authorized under this
107 subsection as approved beds in the published inventory of
108 nursing home beds until the beds are licensed.

109
110 This subsection shall be repealed upon the expiration of the
111 moratorium established in subsection (1).

BILL

ORIGINAL

YEAR
CS

112 Section 2. Paragraph (d) of subsection (1) of section
113 408.040, Florida Statutes, is redesignated as paragraph (e), and
114 a new paragraph (d) is added to that subsection to read:

115 408.040 Conditions and monitoring.--


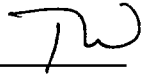
116 (1)

117 (d) If a nursing home is located in a county in which a
118 long-term care community diversion pilot project has been
119 implemented under s. 430.705 or in a county in which an
120 integrated, fixed-payment delivery system for Medicaid
121 recipients who are 60 years of age or older has been implemented
122 under s. 409.912(5), the nursing home may request a reduction in
123 the percentage of annual patient days used by residents who are
124 eligible for care under Title XIX of the Social Security Act,
125 which is a condition of the nursing home's certificate of need.
126 The agency shall automatically grant the nursing home's request
127 if the reduction is not more than 15 percent of the nursing
128 home's annual Medicaid-patient-days condition. A nursing home
129 may submit only one request every 2 years for an automatic
130 reduction. A requesting nursing home must notify the agency in
131 writing at least 60 days in advance of its intent to reduce its
132 annual Medicaid-patient-days condition by not more than 15
133 percent. The agency must acknowledge the request in writing and
134 must change its records to reflect the revised certificate-of-
135 need condition. This paragraph expires June 30, 2011.

136 Section 3. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB ELT 06-02 Nursing home consumer information
SPONSOR(S): Elder & Long-Term Care Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 1284

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Elder & Long-Term Care Committee		DePalma 	Walsh 
1) _____	_____	_____	_____
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The PCB requires AHCA to publish the Nursing Home Guide Watch List within the Nursing Home Guide – quarterly in electronic form, and annually in hard copy. It also requires that AHCA report certain information, and that each nursing home post information about itself within its facility.

The PCB has an effective date of October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower Families – The PCB incorporates, within the Nursing Home Guide published by the Agency for Health Care Administration, a Nursing Home Guide Watch List. This effectively consolidates the previously distinct documents and aligns the information therein, providing families seeking nursing home care for their loved ones more easily-accessible information.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Consumers seeking information about nursing homes have many different tools available to review both cumulative and individualized sources of information about such facilities. However, numerous statutory requirements and regulatory policies have resulted in varied presentation formats for this information, and consumers are frequently exposed to uncoordinated accounts of the performance of the state's nursing home facilities.

The Nursing Home Inspection Process

At least annually, the Agency for Health Care Administration (AHCA, or "the agency") inspects all licensed nursing homes. Inspections are unannounced, typically last between three and four days, and include a facility tour; interviews with residents, families, staff, visitors and volunteers; assessments of resident rights, protections and activities; and medical record reviews. If serious concerns or complaints warrant, AHCA frequently conducts additional inspections.

Each deficiency that is observed and cited by AHCA is ultimately classified as a Class I, II, III or IV deficiency, as described below:

- A **class I deficiency** is a deficiency that the agency determines presents a situation in which immediate corrective action is necessary because the facility's noncompliance has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in a facility.
- A **class II deficiency** is a deficiency that the agency determines has compromised the resident's ability to maintain or reach his or her highest practicable physical, mental, and psychological well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services.
- A **class III deficiency** is a deficiency that the agency determines will result in no more than minimal physical, mental, or psychological discomfort to the resident or has the potential to compromise the resident's ability to maintain or reach his or her highest practical physical, mental, or psychological well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services.
- A **class IV deficiency** is a deficiency that the agency determines has the potential for causing no more than a minor negative impact on the resident.

Within 10 days of an inspection, nursing homes are required to submit a written Plan of Correction detailing how all deficiencies listed will be corrected, and state inspectors then conduct follow-up visits to monitor a facility's progress. Given the complexity of the survey process, even the highest quality facilities may have several minor deficiencies. Severe deficiencies frequently result in fines, restrictions to patient admissions, change of ownership, or facility closure.

Following this inspection process, nursing homes are then provided with either a “standard” or “conditional” license. A standard license indicates a facility is fully-compliant with certain minimum standards, while a conditional license indicates that a particular facility did not meet, or subsequently correct upon follow-up, such minimum standards at the time of an annual or complaint inspection. Immediate action is required for deficiencies that pose a threat to resident health or safety.

AHCA supplies paper copies of all nursing home inspection reports to the local long-term care ombudsman council, AHCA's local office and the public library or county seat for the county in which the nursing facility is located.

Florida's Nursing Home Guide

Annually, AHCA publishes the Nursing Home Guide (“the Guide”), a publication compiling a 45-month review of regulatory compliance and demographic information for each nursing home licensed in the state. The Guide ranks the performance of the state's nursing homes based on inspection results, quality of care, quality of life and administrative performance, and allows consumers to search for nursing homes in the state by geographic region, or by characteristics of the various facilities. Information contained in the Guide is also quarterly updated by AHCA on an Internet website.

General data provided in the Guide includes the following¹:

- General guidance about when a nursing home is the appropriate choice of care.
- General guidance about selecting a nursing home.
- Contact information, such as phone numbers and websites, where questions can be answered, and further information obtained.
- A listing of all nursing home facilities in the state of Florida, including hospital-based skilled nursing units.
- The name, address, phone numbers and websites for each licensed facility.
- An indication of whether the facility has been awarded a Gold Seal.
- Details regarding each facility's current licensee, including the year of licensure and whether such licensee is a for-profit or non-profit entity, and whether or not the facility is part of a retirement community.
- A facility's corporate or religious affiliations.
- The number of private, semi-private, and total beds at a facility.
- The lowest daily charge for a semi-private room.
- The payment forms accepted by a facility.
- Any special services or amenities, or recreational programs provided by a facility.
- Non-English languages spoken by the administrator or staff of a facility.
- A summary of the deficiencies found at the facility over a 45 month period prior to the publication of the Guide.

Within the Guide, AHCA also ranks nursing homes by region, using a five-star “performance measure” system.² Furthermore, the agency calculates certain “inspection measures” to assess nursing homes' compliance with the various federal laws governing nursing homes accepting Medicare or Medicaid payments.³ Although such measures assess compliance with federal regulations, the state of Florida conducts the actual inspections as a subcontractor of the federal Centers for Medicare and Medicaid Services (CMS).

¹ Rule 59A-4.165, F.A.C.

² AHCA notes that such performance measures represent a nursing home's ranking within its own geographic region. Potentially, all of the nursing homes in a particular region could perform better or worse than the statewide average. Therefore, a low rank does not necessarily indicate a “low quality” facility, and a high rank does not necessarily indicate a “high quality” facility.

³ For the 10 nursing homes that accept neither Medicare nor Medicaid, such federal laws are inapplicable; these facilities are inspected for compliance with state laws only.

Following an inspection, a list of citations is provided to the facility, and AHCA computes a score indicating the number of facility citations observed, as well as their severity and scope. In total, there are 255 possible citations a facility may receive, grouped and ranked in three separate categories: "quality of care", "quality of life" and "administration."

Florida's Nursing Home Guide Watch List

Pursuant to statutory direction contained in s. 400.191(3)(a), F.S., AHCA quarterly publishes (in printed form and on an Internet website) a Nursing Home Guide Watch List (the "Watch List") to assist consumers in evaluating the quality of nursing home care in Florida. A copy of the Watch List is mailed to each nursing home facility, and each facility is responsible for posting the most recent version of the Watch List "in a sufficient number of prominent positions in the nursing home so as to be accessible to all residents and to the general public."

The primary function of the Watch List is to identify each facility that met the criteria for a "conditional" licensure status, and any facility that was operating under bankruptcy protection, on any day within the quarter covered by the list. For these facilities, the Watch List must include, but is not limited to the following:

- The facility's name, address and ownership.
- The county in which the facility operates.
- The facility's license expiration date.
- The number of licensed beds in the facility.
- A description of the deficiency causing the facility to be placed on the list, as well as a description of any corrective action taken in the interim.
- The cumulative number of times the facility has been placed on the Watch List.

The Watch List also must include a brief description regarding how to choose a nursing home, the categories of facility licensure, an explanation of AHCA's inspection process and the terms used in the Watch List, and the address and phone numbers of AHCA's managed care and health quality area offices.

Because a conditional license status can be used to classify both those facilities responsible for serious deficiencies as well as facilities failing to correct relatively minor deficiencies, a nursing home can appear on the Watch List while simultaneously maintaining a high ranking in the Guide. Potentially, this creates a confusing divergence for consumers attempting to use the documents prior to selecting a nursing facility.

EFFECT OF PROPOSED CHANGES

The Proposed Committee Bill amends s. 400.191, F.S. in several ways. The PCB provides that AHCA may grant electronic access to its inspection reports as a substitute for sending copies, within 60 days of an annual inspection visit or 30 days of an interim visit, to the local long-term care ombudsman council, the agency's local office and a public library or the county seat for the county in which the facility is located.

The PCB also explicitly requires AHCA to publish the Nursing Home Guide annually in consumer-friendly printed form, and quarterly in electronic form.

Furthermore, the legislation requires AHCA to list all prior names by which a nursing facility was known during the previous 24 months, the facility's occupancy levels and all federal and state recertification, licensure, revisit and complaint survey information on an Internet site. Additionally, all references to the Online Survey Certification and Reporting (OSCAR) system maintained by the federal Health Care Financing Administration are deleted from the section, and the amount of time survey and deficiency information shall remain available in printed form, and posted by AHCA on an Internet site is reduced

from 45 to 30 months. This reduction in the amount of time certain regulatory history is to remain available in various forms conforms to the timeframes common for various programs such as the Governor's Gold Seal Program⁴ for nursing facilities demonstrating excellence in long-term care over a sustained period.

The PCB requires AHCA to publish, within its Nursing Home Guide, a Nursing Home Guide Watch List. This effectively merges the two previously-distinct documents. The Watch List is intended to assist consumers in evaluating the quality of nursing home care in the state by identifying each facility that either met the criteria for a conditional licensure status or is presently operating under bankruptcy protection. Additionally, the PCB requires itemization within the Watch List of the cumulative number of days, and the percentage of days, that a facility had a conditional license during the 30 months preceding publication.

Upon publication of its Nursing Home Guide, the PCB requires AHCA to post a copy of the Guide on its website by the 15th calendar day of the second month following the end of the calendar quarter, and each nursing home licensee is then required to retrieve the most recent version of the Guide from AHCA's website.

The PCB requires electronic submission, when available, of records determined by AHCA to be necessary and essential to establish lawful compliance with any rules or standards. Facilities are also required to post, in a sufficient number of prominent positions in the nursing home so as to be accessible to all residents and to the general public, a copy of all pages in the most recent Nursing Home Guide listing the facility.

The PCB has an effective date of October 1, 2006.

C. SECTION DIRECTORY:

Section 1. Amends s. 400.191, F.S.; provides for electronic access to inspection reports; requires publication of the Nursing Home Guide, annually in printed form, and quarterly in electronic form; requires AHCA to list prior names by which a facility was known during the previous 24 months, the facility's occupancy levels and all federal and state recertification, licensure, revisit and complaint survey information on an Internet site; deletes references to survey and deficiency information contained on the Online Survey Certification and Reporting (OSCAR) system, and reduces the time period such survey and deficiency information shall remain available in printed form, and posted on an Internet site; provides for publication of a "Nursing Home Guide Watch List" within the Nursing Home Guide; provides for identification in the Nursing Home Guide Watch List of each facility meeting the criteria for a conditional licensure status and each facility operating under bankruptcy protection; provides for inclusion on the Nursing Home Guide Watch List of the cumulative number of days and percentage of days a facility had a conditional license during the preceding 30 months; requires AHCA to post a copy of the Nursing Home Guide on its website by the 15th calendar day of the second month following the end of the calendar quarter; requires each nursing home licensee to retrieve the most recent version of the Nursing Home Guide from AHCA's website; requires electronic submission, when available, of records determined by AHCA to be necessary and essential to establish lawful compliance with any rules or standards; requires facilities to post, in a sufficient number of prominent positions throughout the facility, a copy of all pages from the most recent version of the Nursing Home Guide which list the facility.

Section 2. Provides an effective date of October 1, 2006.

⁴ Per s. 400.235, F.S., one of the requirements for Gold Seal certification is that a facility has had no class I or II deficiencies within the 30 months preceding application for the program.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None immediately, although AHCA reports a potential decrease in the costs associated with printing and distribution of the Nursing Home Guide and Nursing Home Guide Watch List through consolidation of the two previously-distinct documents.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Counties and municipalities are unaffected by this legislation.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

BILL

Redraft - A

YEAR

1 A bill to be entitled

2 An act relating to nursing home consumer information;
3 amending s. 400.191, F.S.; authorizing the Agency for
4 Health Care Administration to provide electronic access to
5 nursing home inspection reports; requiring the agency to
6 publish the Nursing Home Guide in printed and electronic
7 format at certain times and specifying information to be
8 included therein; requiring the agency to provide certain
9 consumer information in the Nursing Home Guide; deleting
10 reference to an obsolete reporting system; requiring each
11 nursing home facility to submit certain information
12 electronically when electronic transmission to the agency
13 is available; providing an effective date.

14
15 Be It Enacted by the Legislature of the State of Florida:

16
17 Section 1. Section 400.191, Florida Statutes, is amended to
18 read:

19 400.191 Availability, distribution, and posting of reports
20 and records.--

21 (1) The agency shall provide information to the public
22 about all of the licensed nursing home facilities operating in
23 the state. The agency shall, within 60 days after an annual
24 inspection visit or within 30 days after any interim visit to a
25 facility, send copies of the inspection reports to the local
26 long-term care ombudsman council, the agency's local office, and
27 a public library or the county seat for the county in which the
28 facility is located. The agency may provide electronic access to
29 inspection reports as a substitute for sending copies.

BILL

Redraft - A

YEAR

30 (2) The agency shall publish the Nursing Home Guide
31 annually ~~provide additional information~~ in consumer-friendly
32 printed form and quarterly in electronic form ~~formats~~ to assist
33 consumers and their families in comparing and evaluating nursing
34 home facilities.

35 (a) The agency shall provide an Internet site which shall
36 include at least the following information either directly or
37 indirectly through a link to another established site or sites of
38 the agency's choosing:

39 1. A list by name and address of all nursing home
40 facilities in this state, including any prior name by which a
41 facility was known during the previous 24-month period.

42 2. Whether such nursing home facilities are proprietary or
43 nonproprietary.

44 3. The current owner of the facility's license and the year
45 that that entity became the owner of the license.

46 4. The name of the owner or owners of each facility and
47 whether the facility is affiliated with a company or other
48 organization owning or managing more than one nursing facility in
49 this state.

50 5. The total number of beds in each facility and the most
51 recently available occupancy levels.

52 6. The number of private and semiprivate rooms in each
53 facility.

54 7. The religious affiliation, if any, of each facility.

55 8. The languages spoken by the administrator and staff of
56 each facility.

57 9. Whether or not each facility accepts Medicare or
58 Medicaid recipients or insurance, health maintenance

BILL

Redraft - A

YEAR

59 organization, Veterans Administration, CHAMPUS program, or
60 workers' compensation coverage.

61 10. Recreational and other programs available at each
62 facility.

63 11. Special care units or programs offered at each
64 facility.

65 12. Whether the facility is a part of a retirement
66 community that offers other services pursuant to part III, part
67 IV, or part V.

68 13. Survey and deficiency information ~~contained on the~~
69 ~~Online Survey Certification and Reporting (OSCAR) system of the~~
70 ~~federal Health Care Financing Administration, including all~~
71 federal and state recertification, licensure annual survey,
72 revisit, and complaint survey information, for each facility for
73 the past 30 45 months. For noncertified nursing homes, state
74 survey and deficiency information, including licensure annual
75 survey, revisit, and complaint survey information for the past 30
76 45 months shall be provided.

77 14. A summary of the deficiency ~~Online Survey Certification~~
78 ~~and Reporting (OSCAR)~~ data for each facility over the past 30 45
79 months. Such summary may include a score, rating, or comparison
80 ranking with respect to other facilities based on the number of
81 citations received by the facility on recertification, licensure
82 ~~of annual~~, revisit, and complaint surveys; the severity and scope
83 of the citations; and the number of ~~annual~~ recertification
84 surveys the facility has had during the past 30 45 months. The
85 score, rating, or comparison ranking may be presented in either
86 numeric or symbolic form for the intended consumer audience.

87 (b) The agency shall provide the following information in

BILL

Redraft - A

YEAR

88 | printed form:
89 | 1. A list by name and address of all nursing home
90 | facilities in this state.
91 | 2. Whether such nursing home facilities are proprietary or
92 | nonproprietary.
93 | 3. The current owner or owners of the facility's license
94 | and the year that entity became the owner of the license.
95 | 4. The total number of beds, and of private and semiprivate
96 | rooms, in each facility.
97 | 5. The religious affiliation, if any, of each facility.
98 | 6. The name of the owner of each facility and whether the
99 | facility is affiliated with a company or other organization
100 | owning or managing more than one nursing facility in this state.
101 | 7. The languages spoken by the administrator and staff of
102 | each facility.
103 | 8. Whether or not each facility accepts Medicare or
104 | Medicaid recipients or insurance, health maintenance
105 | organization, Veterans Administration, CHAMPUS program, or
106 | workers' compensation coverage.
107 | 9. Recreational programs, special care units, and other
108 | programs available at each facility.
109 | 10. The Internet address for the site where more detailed
110 | information can be seen.
111 | 11. A statement advising consumers that each facility will
112 | have its own policies and procedures related to protecting
113 | resident property.
114 | 12. A summary of the deficiency ~~Online Survey Certification~~
115 | ~~and Reporting (OSCAR)~~ data for each facility over the past 30 ~~45~~
116 | months. Such summary may include a score, rating, or comparison

BILL

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YEAR

117 ranking with respect to other facilities based on the number of
118 citations received by the facility on recertification, licensure
119 ~~annual~~, revisit, and complaint surveys; the severity and scope of
120 the citations; the number of citations; and the number of ~~annual~~
121 recertification surveys the facility has had during the past 30
122 ~~45~~ months. The score, rating, or comparison ranking may be
123 presented in either numeric or symbolic form for the intended
124 consumer audience.

125 ~~(c) For purposes of this subsection, references to the~~
126 ~~Online Survey Certification and Reporting (OSCAR) system shall~~
127 ~~refer to any future system that the Health Care Financing~~
128 ~~Administration develops to replace the current OSCAR system.~~

129 (c) ~~(d)~~ The agency may provide the following additional
130 information on an Internet site or in printed form as the
131 information becomes available:

- 132 1. The licensure status history of each facility.
- 133 2. The rating history of each facility.
- 134 3. The regulatory history of each facility, which may
135 include federal sanctions, state sanctions, federal fines, state
136 fines, and other actions.
- 137 4. Whether the facility currently possesses the Gold Seal
138 designation awarded pursuant to s. 400.235.
- 139 5. Internet links to the Internet sites of the facilities
140 or their affiliates.

141 (3) Each nursing home facility licensee shall maintain as
142 public information, available upon request, records of all cost
143 and inspection reports pertaining to that facility that have been
144 filed with, or issued by, any governmental agency. Copies of the
145 ~~such~~ reports shall be retained in the ~~such~~ records for not less

BILL

Redraft - A

YEAR

146 than 5 years following ~~from~~ the date the reports are filed or
147 issued.

148 (a) The agency shall ~~quarterly~~ publish in the Nursing Home
149 Guide a "Nursing Home Guide Watch List" to assist consumers in
150 evaluating the quality of nursing home care in Florida. The watch
151 list must identify each facility that met the criteria for a
152 conditional licensure status to be noticed as specified in this
153 section ~~on any day within the quarter covered by the list~~ and
154 each facility that is ~~was~~ operating under bankruptcy protection
155 ~~on any day within the quarter~~. The watch list must include, but
156 is not limited to, the facility's name, address, and ownership;
157 the county in which the facility operates; the license expiration
158 date; the number of licensed beds; a description of the
159 deficiency causing the facility to be placed on the list; any
160 corrective action taken; and the cumulative number of days and
161 percentage of days ~~times~~ the facility had a conditional license
162 during the past 30 months ~~has been on a watch list~~. The watch
163 list must include a brief description regarding how to choose a
164 nursing home, the categories of licensure, the agency's
165 inspection process, an explanation of terms used in the watch
166 list, and the addresses and phone numbers of the agency's ~~managed~~
167 ~~care and health quality assurance field area~~ offices.

168 (b) Upon publication of each Nursing Home Guide ~~quarterly~~
169 ~~watch list~~, the agency must post ~~transmit~~ a copy on its Internet
170 website by the 15th calendar day of the second month following
171 the end of the calendar quarter. Each nursing home licensee must
172 retrieve the most recent version of the Nursing Home Guide from
173 ~~of the watch list to each nursing home facility by mail and must~~
174 ~~make the watch list available on the agency's Internet website~~.

BILL

Redraft - A

YEAR

175 (4) Any records of a nursing home facility determined by
176 the agency to be necessary and essential to establish lawful
177 compliance with any rules or standards shall be made available to
178 the agency on the premises of the facility and submitted to the
179 agency. Each facility must submit this information electronically
180 when electronic transmission to the agency is available.

181 (5) Every nursing home facility licensee shall:

182 (a) Post, in a sufficient number of prominent positions in
183 the nursing home so as to be accessible to all residents and to
184 the general public:

185 1. A concise summary of the last inspection report
186 pertaining to the nursing home and issued by the agency, with
187 references to the page numbers of the full reports, noting any
188 deficiencies found by the agency and the actions taken by the
189 licensee to rectify the ~~such~~ deficiencies and indicating in the
190 ~~such~~ summaries where the full reports may be inspected in the
191 nursing home.

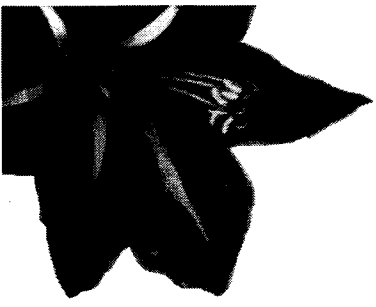
192 2. A copy of all pages listing the facility from the most
193 recent version of the Florida Nursing Home Guide ~~Watch-List~~.

194 (b) Upon request, provide to any person who has completed a
195 written application with an intent to be admitted to, or to any
196 resident of, such nursing home, or to any relative, spouse, or
197 guardian of such person, a copy of the last inspection report
198 pertaining to the nursing home and issued by the agency, provided
199 the person requesting the report agrees to pay a reasonable
200 charge to cover copying costs.

201 (6) The agency may adopt rules as necessary to administer
202 this section.

203 Section 2. This act shall take effect October 1, 2006.

PRESENTATIONS



Florida's Long-Term Care Ombudsman Program

Real People Helping Real People



Real People Helping Real People

★Florida's Long-Term Care Ombudsman Program

- Volunteer program formed in 1975
- Result of federal Older Americans Act
- Administered by Department of Elder Affairs
- Similar programs exist in all states in U.S.

Real People Helping Real People

★The Program's Mission

- Advocating for the highest quality of care and life for long-term care facility residents by:
 - Identifying, investigating and resolving complaints
 - Promoting enforcement of laws and regulations
 - Advising and recommending policy to state and federal governments on long-term care issues

Volunteers — The Program's Backbone



- ★ More than 350 volunteer ombudsmen around the state each give an average of 20 hours per month to the program
- ★ They advocate for the rights of elders in nursing homes, assisted living facilities and adult family care homes

Volunteers – The Program's Backbone

- ★ Ombudsmen identify and respond to individual concerns expressed by long-term care residents, their families, friends and other concerned citizens
- ★ Investigation topics range from food and medication issues to matters of dignity, privacy and respect

Resident Concerns

- ★ In 2004-05, volunteer ombudsmen responded to concerns about medication administration more than any other issue
- ★ Other prominent concerns included personal hygiene; accidents, falls and improper handling; improper discharge and lost or stolen personal property

Resident Concerns

Most Frequent Complaints in Nursing Homes, 2004-05

Type of complaint	# of complaints
Accidents / Injuries / Falls	220
Improper Transfer / Discharge	214
Medication Administration	212
Personal Hygiene	203
Call Lights / Requests for Assistance	171

Resident Concerns

*Most Frequent Complaints in Assisted Living Facilities
and Adult Family Care Homes, 2004-05*

Type of complaint	# of complaints
Medication Administration	162
Menu – Quality, Quantity, Variation	139
Shortage of Staff	107
Billing/Charges	85
Cleanliness – Pests, Housekeeping	78

Excellence in Advocacy

- ★ Equipping ombudsmen with cutting-edge information remains a high priority (Section, 400.0091, F.S.)
 - Fifth annual statewide ombudsman training conference scheduled for May 2006
 - Regionalized trainings coincide with quarterly leadership meetings and focus on concentrated advocacy topics, e.g., access to residents' records
 - Local councils educate volunteers on issues affecting residents within their own communities

Organizational Analysis & Strategic Plan

- ★ An organizational analysis will enhance the program's infrastructure through a stronger, more cohesive volunteer-staff relationship.
- ★ A strategic plan is in development to identify program goals and objectives relating to:
 - Resident advocacy
 - Program awareness
 - Staff and volunteer training

Public Awareness and Recruitment

- ★ Integrated Communications Campaign
 - Public Relations Efforts
 - Proactive, positive statewide media outreach
 - Advertising Efforts
 - PSAs and paid print, television and radio ads
 - Grass Roots Efforts
 - Ombudsmen acting as empowered community ambassadors via speakers' bureaus, partnerships

Current Legislation – HB 1067

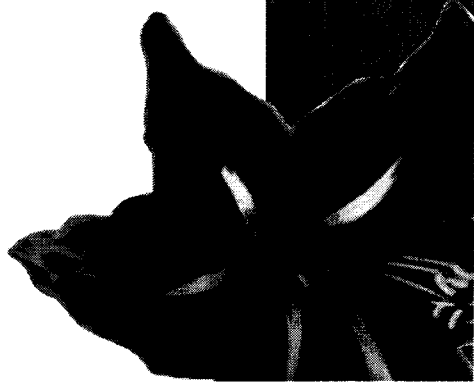
★ House Bill 1067 by Representative Grimsley will better serve Florida's long-term care residents by:

- Strengthening the authority of the Office of State Long-Term Care Ombudsman to advocate for long-term care residents in Florida
- Removing barriers to volunteerism
- Conforming more closely to the intent of the federal Older Americans Act

THANK YOU

*Contact Brian Lee,
State Long-Term Care Ombudsman:
(850) 414-2331*

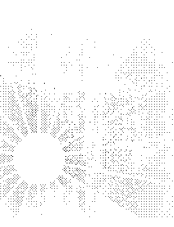
*E-mail:
leeb@elderaffairs.org*



Public Guardianship in Florida

House Elder & Long-Term Care
Committee
February 22, 2006

DEPARTMENT OF



ELDER
AFFAIRS
STATE OF FLORIDA

Michelle R. Hollister, Executive Director
Statewide Public Guardianship Office
Florida Department of

Jeb Bush
Governor

en

Overview

- When adults become incapacitated, either from an accident, aging, or they are developmentally disabled to the degree of incapacity – someone must assist with decision making process.
- If individuals have not designated someone to assist them when they had capacity- a guardian may need to be appointed.

Guardianship Process

- Guardianship is a two step process:

1. Incapacity Proceeding

Petition

Examining Committee

Court Appointed Attorney

Lesser Restrictive Alternatives

2. Appointment of the Guardian

Types of Guardians

- Family/Friend
- Professional
- Public



Requirements

Family / Friend

- Background check (credit and criminal)
- Eight hours of training unless a parent is appointing a minor child, then only four hours are required.

Professional

- Must register with the Statewide Public Guardianship Office
- Background check (credit and criminal)
- 40 hours of training
- Competency examination
- Bond

ALL guardians are required to have an attorney.

Professional Guardian Registration

Every professional guardian in Florida must be licensed by the Statewide Public Guardianship Office. Licensure includes:

- Criminal History
- Credit History
- Proof of Bond
- Educational Requirements (40 hours of training, 16 continuing education hours every two years, and competency examination)

Professional Guardian Examination

Effective July 1, 2005 - Each Professional Guardian in Florida has been required to take the Professional Guardian Competency Examination.

- The Statewide Public Guardianship Office contracted with the National Guardianship Foundation to develop and implement the professional guardian exam.

The Exam

- Three-hour multiple choice test
- Two equal parts
 - Universal guardianship ethics and practices
 - Florida guardianship law and procedure
- The Statewide Public Guardianship Office can waive the exam only if a professional guardian has practiced for at least five years *and* a judge writes a letter indicating he or she has demonstrated competence to the court.

Professional Guardian Competency Exam Success

- 325 professional guardians have taken the exam
- The passage rate for 2005 was approximately 80%
- The exam has been independently evaluated by Bradley University's Education Leadership & Human Development Department. The evaluation, using Cronbach's Alpha, found all versions of the exam to have "excellent consistency."

Responsibilities of a Guardian to the Court

- Annual accountings to the court
(Unless only receive government benefits)
- Annual plans to the court

Who can be served by a public guardian?

- Incapacitated persons
- No willing family or friend
- Limited financial means (Defined as not having sufficient assets to compensate a professional guardian)



Need in Elder & Long-Term Care Committee Districts*

(*Only includes Adult Protective Services cases)

Sumter and Lake

Need: High

Pinellas

Need: High

Broward

Need: High

St. Lucie, Martin,

Okeechobee

Need: Low

Pasco

Need: High

Miami-Dade

Need: High

Sarasota

Need: High

Palm Beach

Need: High

The most restrictive form of surrogate decision making is guardianship.

Alternatives:

Guardian Advocacy

Advance Directives

Power of Attorney

Health Care Surrogate

Every person over the age of 18 should have an advance directive.

Guardian Advocacy

- A Guardian Advocate under Chapter 393, Florida Statutes, is for persons with severe developmental disabilities. There are five recognized under Florida law:

1. Autism
2. Cerebral Palsy
3. Mental Retardation
4. Spina B
5. Prader-Willi

- The Guardianship Statutes, Chapter 744, now reference Guardian Advocates in Chapter 393. Major difference - No incapacity proceeding under chapter 393.

2006 Guardianship Legislation

- Containing recommendation of the Guardianship Task Force:
 - HBs 457/459 Rep. Sands & SBs 472/473 Sen. Saunders
 - SB 476 by Sen. Saunders
 - SB 380 Sen. Fasano
- Other measures:
 - SBs 356/358 by Sen. Campbell & HBs 191/193 by Rep. Bogdanoff

Where to Get More Information

- Statewide Public Guardianship Office:
(850) 414-2381 or visit us online at
<http://elderaffairs.state.fl.us>

